No. 87-751-CFX
Status: GRANTED

Title: Frank C. Carlucci, Secretary of Defense, et al., Petitioners
v.
John Doe

Docketed:
November 4, 1987

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Gill Jr.,John G., Bienvenu,Leonard

Entry	Date	Note	Proceedings and Orders
1	Nov 4 1987	G	Petition for writ of certiorari filed.
2	Dec 9 1987		DISTRIBUTED. January 8, 1988
3	Dec 9 1987		Brief of respondent John Doe in opposition filed.
4	Dec 9 1987	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Dec 30 1987	X	Reply brief of petitioners Sec. of Defense, et al. filed.
6	Feb 22 1988		REDISTRIBUTED. February 26, 1988
7	Feb 29 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Feb 29 1988		Petition GRANTED.
			**********
11	Mar 31 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
10	Apr 1 1988		Order extending time to file brief of petitioner on the merits until May 7, 1988.
12	Apr 18 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
14	May 6 1988		Brief of petitioners Sec. of Defense, et al. filed.
13	May 7 1988		Lodging received. (10 copies - box).
16	Jun 2 1988		Order extending time to file brief of respondent on the merits until July 2, 1988.
17	Jul 1 1988		Brief amicus curiae of ACLU Foundation filed.
18	Jul 2 1988		Brief of respondent John Doe filed.
19	Jul 15 1988		Set for argument. Tuesday, October 11, 1988. (4th case) (1 hr.)
21	Jul 19 1988	G	Application (A88-71) for an extension of time within which to file a reply brief, submitted to The Chief Justice.
20	Jul 20 1988		Record filed.
		*	Certified original record received.
22	Jul 25 1988		CIRCULATED.
23	Jul 28 1988		Application (A88-71) granted by the Chief Justice extending the time to file until August 29, 1988.
24	Aug 23 1988	X	Reply brief of petitioners Frank Carlucci, et al. filed.
25	Oct 11 1988		ARGUED.

No. 87 751

Supreme Court, U.S.
FILED
NOV 4 1987
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether an employee of the National Security Agency who fails to maintain a required clearance for access to classified information may be dismissed "for cause," without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833.

PARTIES TO THE PROCEEDING

Petitioners are Caspar Weinberger, Secretary of Defense, and Lt. General William E. Odom, Director of the National Security Agency (NSA). Respondent is a former employee of NSA. Respondent sued as John Doe in order to protect his employment status with NSA and because the "private and personal subject matter of this suit" might jeopardize his employment opportunities outside NSA (Plaintiff's Mot. for Leave to File as John Doe ¶¶ 2-3).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	1
Statement	2
A. The statutory and regulatory framework	3
B. Proceedings below	7
Reasons for granting the petition	10
Conclusion	20
Appendix A	1a
Appendix B	17a
Appendix C	22a
Appendix D	24a
Appendix E	26a
Appendix F	44a

TABLE OF AUTHORITIES

Cases:

Arnett v. *Kennedy*, 416 U.S. 134 (1974)	11
Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961)	11
Cole v. *Young*, 351 U.S. 536 (1956)	6, 11, 14
Crenshaw v. *United States*, 134 U.S. 99 (1890)	11
De Castro v. *Board of Comm'rs*, 322 U.S. 451 (1944)	11
Egan v. *Department of the Navy*, 802 F.2d 1563 (Fed. Cir. 1986), cert. granted, No. 86-1552 (May 26, 1987)	2, 3, 10, 11, 17, 19, 20
Hennen, In re, 38 U.S. (13 Pet.) 230 (1839)	11
Hoska v. *Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982)	11
Keim v. *United States*, 177 U.S. 290 (1900)	11
Shurtleff v. *United States*, 189 U.S. 311 (1903)	11

Statutes and regulations:

Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476	13
Act of Mar. 26, 1964, Tit. III, 50 U.S.C. 831 *et seq.*	2
50 U.S.C. 831	2, 5, 11, 12, 15, 18, 32a
50 U.S.C. 832	2, 12, 32a

Statutes and regulations—Continued: Page

50 U.S.C. 832(a) 5, 12, 32a-33a
50 U.S.C. 832(b) 5, 8, 12, 15, 33a-34a
50 U.S.C. 833 ..... 9, 10, 15, 34a
50 U.S.C. 833(a) 2, 7, 15, 34a
50 U.S.C. 833(b) 34a-35a
50 U.S.C. 833(c) 35a
50 U.S.C. 834 ..... 35a
50 U.S.C. 835 ..... 35a
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 2-3
Ch. 73, 5 U.S.C. 7301 *et seq.*:
5 U.S.C. 7312 ..... 1, 14, 26a
Ch. 75, 5 U.S.C. 7501 *et seq.* 4
5 U.S.C. 7501(1) 4
5 U.S.C. 7511 ..... 1, 26a-27a
5 U.S.C. 7511(a)(1)(B) 4
5 U.S.C. 7512 ..... 1, 7, 15, 27a-28a
5 U.S.C. 7512-7513 4
5 U.S.C. 7513 ..... 1, 4, 17, 28a-29a
National Security Agency Act of 1959, 50 U.S.C. 402 note 2, 4, 9, 11, 30a-32a
5 U.S.C. 7531 6
5 U.S.C. 7532 ..... *passim*
5 U.S.C. 7532(a) 6
5 U.S.C. 7532(b) 6, 14
Exec. Order No. 10,450, § 1, 3 C.F.R. 936 (1949-1953 comp.) 6

Miscellaneous:

DoD Directive No. 5100.23 (May 17, 1967) 4
Hearings on S. 1561 Before a Subcomm. of the Senate Comm. on Armed Services, 80th Cong., 1st Sess. (1948) 14
H.R. Rep. 2264, 80th Cong., 2d Sess. (1948) 13
H.R. Rep. 2330, 81st Cong., 2d Sess. (1950) 14
National Security Agency Personnel Management Manual 30-2 (Aug. 12, 1980) 2, 4, 11, 36a-43a
S. Rep. 2158, 81st Cong., 2d Sess. (1950) 13
Sensitive Compartmented Information: Characteristics and Security Requirements (June 1984) 5, 44a-51a

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

JOHN DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the Director of the National Security Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 820 F.2d 1275. The opinion of the district court (App., *infra*, 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 22a-23a) was entered on June 9, 1987. A petition for rehearing with suggestion for rehearing en banc was denied on August 18, 1987 (App., *infra*, 24a-25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions, 5 U.S.C. 7312, 7511-7513, and 7532, and relevant portions of the

National Security Agency Act of 1959, 50 U.S.C. 402 note, the Act of Mar. 26, 1964, Tit. III, 50 U.S.C. 831 *et seq.*, and Chapter 370 of National Security Agency Personnel Management Manual 30-2 (Aug. 12, 1980) are set forth in App., *infra*, 26a-43a.

STATEMENT

Respondent was removed "for cause" from his position with the National Security Agency (NSA or the Agency) after it was determined that his access to classified information was no longer "clearly consistent with the national security." See 50 U.S.C. 831. The court of appeals held that the Director of NSA has no authority to remove an employee for cause where the cause for the removal is related to national security. Rather, the court held, an NSA employee may be removed on national security grounds only by the Secretary of Defense acting in person, under either 5 U.S.C. 7532 or 50 U.S.C. 833(a). The court of appeals ruled that the National Security Agency Act of 1959, 50 U.S.C. 402 note, which gives the Secretary of Defense or his designee the power to establish positions in the Agency and make appointments thereto without regard to the civil service laws, and 50 U.S.C. 831 and 832, which prohibit employment of any person at the Agency in a position involving access to classified information unless such access is "clearly consistent with the national security," do not authorize the removal for cause of an employee who fails to maintain his eligibility for such access.

The court of appeals' decision conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), cert. granted, No. 86-1552 (May 26, 1987), which held that a competitive service employee denied a security clearance required by his job could be removed for cause under the general removal provisions of the Civil Service Reform Act of 1978 (CSRA), Pub. L.

No. 95-454, 92 Stat. 1111, without invocation of 5 U.S.C. 7532. The Court granted certiorari in that case to decide whether, in the course of reviewing such a removal, the Merit Systems Protection Board (MSPB) is authorized by statute to review the substance of the underlying decision to deny or revoke the security clearance. The question presented to this Court in *Egan* arose only because the Federal Circuit decided the logically prior question—whether the Navy could remove Egan "for cause" without invoking Section 7532—in a way that conflicts with the later decision of the D.C. Circuit in the present case.

Briefs in chief have been filed in *Egan* and the case has been scheduled for argument on December 2, 1987. Accordingly, although the removal for cause issue has not been joined in *Egan*,[1] the Court may wish to defer consideration of this petition pending the Court's decision in *Egan*.[2]

A. THE STATUTORY AND REGULATORY FRAMEWORK

1. The National Security Agency was established by Presidential Directive in 1952 as a separately organized intelligence agency within the Department of Defense. The

---

[1] Respondent Egan concedes that the Navy had authority to dismiss him for cause without invoking Section 7532. See Resp. Br. at 15, *Department of the Navy* v. *Egan*, cert. granted, No. 86-1552 (May 26, 1987). We have furnished respondent with a copy of our brief in *Egan*. We have also furnished counsel in that case with a copy of the instant petition.

[2] The mandate of the court of appeals in this case has been stayed pending the filing of this petition. The mandate does not direct reinstatement of respondent but would require the district court to remand the case to the Agency for proceedings pursuant to 5 U.S.C. 7532. If, upon such remand, the Secretary of Defense were to suspend and then remove respondent under that section, respondent would presumably be entitled to back pay from the date of the removal challenged in this case to the date of the suspension under that section.

National Security Agency Act of 1959, 50 U.S.C. 402 note (the 1959 NSA Act), gave the Secretary of Defense, or his designee, the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency." In DoD Directive No. 5100.23 (May 17, 1967) (C.A. App. 56-58), the Secretary of Defense delegated his authority under the 1959 NSA Act to the Director of NSA. The Director has in turn promulgated regulations governing personnel matters. NSA Personnel Management Manual 30-2 (Aug. 12, 1980) (NSA/PMM). Chapter 370 of these regulations (App., *infra*, 36a-43a) sets forth the standards and procedures for removing an employee.

Chapter 370 provides, inter alia, that an employee may be removed for "such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4). This overall standard for removal of an NSA employee is identical to that for federal employees who are covered by the CSRA (see 5 U.S.C. 7512-7513). NSA employees also enjoy by regulation many of the same procedural protections afforded federal employees covered by the CSRA, including the right to advance written notice of an adverse action, an opportunity to respond and be represented by counsel, and a written decision (compare 5 U.S.C. 7513 with NSA/PMM §§ 370.3-5 to 370.3-7). Preference eligible veterans employed at NSA, like preference eligible excepted service employees who are covered by 5 U.S.C. Chapter 75 (see 5 U.S.C. 7511(a)(1)(B)), have the right to appeal an adverse action to the MSPB (NSA/PMM § 370.3-8a(1)). Nonveterans at NSA, however, may not appeal adverse actions to the MSPB (*id.* § 370.3-8a(2)), just as nonveterans in the excepted service have no right of MSPB appeal under the CSRA (see 5 U.S.C. 7501(1)).

2. Because of the sensitive nature of the tasks performed by NSA, the Secretary of Defense is statutorily

directed to ensure that no person is employed by the Agency, or granted consequent access to classified information, unless such employment or access is "clearly consistent with national security" (50 U.S.C. 831). In particular, subject to specified exceptions, no person may be employed "unless he has been the subject of a full field investigation" (50 U.S.C. 832(a)). Subsection (b) of the same section provides for boards of appraisal to aid the Secretary and the Director of NSA in making access determinations, and further provides that "[n]o person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment * * * is in the national interest" (50 U.S.C. 832(b)).

All employees at NSA are required to be cleared for access to Sensitive Compartmented Information (SCI), which includes "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." *Sensitive Compartmented Information: Characteristics and Security Requirements* (June 1984), *reprinted in* App., *infra*, 44a-51a.[3] The standards and criteria for access to SCI are "more rigorous and stringent" than those for a top secret clearance, and individuals who have been granted top secret clearances may nonetheless be denied access to SCI (*id.* at 48a).[4]

---

[3] Clearance for access to SCI is a statutory requirement of employment at NSA, except that conditional employment without such access may be granted pending completion of a full field investigation. See 50 U.S.C. 832(a) (requiring clearance for "access to sensitive cryptologic information or material").

[4] "Because of the extreme vulnerability to countermeasures of the operations covered by SCI control systems, * * * a substantially more vigorous personnel screening process is necessary and a determination standard beyond that for other classified information must be used" (App., *infra*, 50a-51a).

3. The Secretary of Defense, like the heads of other agencies, has the power to suspend and thereafter to remove any employee when he determines that such action is necessary or advisable in the interests of national security. Section 7532 of Title 5, United States Code, provides that "the head of an agency" may summarily suspend an employee without pay when he considers such action "necessary in the interests of national security" and may remove a suspended employee when, after following specified procedures, he determines that removal is "necessary or advisable in the interests of national security." 5 U.S.C. 7532(a) and (b).[5] With certain exceptions, an employee suspended under this section is entitled to notice of the reasons for the suspension and an opportunity to respond, a hearing "by an agency authority duly constituted for this purpose," and a written decision. Neither a suspension nor a removal under Section 7532 is subject to any outside review. *Cole* v. *Young*, 351 U.S. 536, 546 (1956). An employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government prior

[5] 5 U.S.C. 7531 contains a list of specific agencies and departments to which Section 7532 applies, but also provides that Section 7532 will apply to any "such other agency * * * as the President designates in the best interests of national security." By Executive Order, the President has extended Section 7532 "to all other departments and agencies of the Government." Exec. Order No. 10,450, § 1, 3 C.F.R. 936 (1949-1953 comp.). However, this Court in *Cole* v. *Young*, 351 U.S. 536, 551 (1956), held that "a condition precedent to the exercise of th[is] dismissal authority is a determination by the agency head that the position occupied is one affected with the 'national security' "—a determination, the Court made clear (*id.* at 548 (footnote omitted)), that will only be possible in agencies with "a close and immediate concern with the defense of the Nation." Thus, Section 7532 in fact has no relevance to many government agencies.

to consultation with the Office of Personnel Management (OPM) (5 U.S.C. 7312).

Congress also gave the Secretary of Defense broad and unreviewable discretion to remove any NSA employee when he considers such action to be in the interest of the United States and determines that compliance with the removal procedures set forth in other provisions of law would not be consistent with national security. 50 U.S.C. 833(a). Section 833(a) provides:

> Notwithstanding sections 7512 and 7532 of title 5, or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

B. PROCEEDINGS BELOW

1. Respondent was employed at NSA from 1968 to 1984 as a cryptographic material control technician (App. *infra*, 2a). In 1982 he disclosed to NSA officials that he had engaged in homosexual relations with unnamed individuals, including foreign nationals (*ibid.*). Respondent was subsequently notified, pursuant to NSA regulations, of his proposed removal from employment on the gound that his continued access to SCI was not clearly consistent with the interests of national security (C.A. App. 83). The notice advised respondent that he had a right to respond, to be represented by counsel, and to review the information upon which the Agency relied in reaching its decision (*id.* at 83-84). The notice also advised respondent that he would be retained in pay status during the adjudication process but that he would not be permitted access to SCI (*id.* at 84).

Through counsel, respondent offered to undergo a psychiatric evaluation to demonstrate that he did not pose a security risk (App., *infra*, 2a). The Agency agreed to the psychiatric evaluation (*id.* at 3a) and, in the meantime, convened a board of appraisal pursuant to 50 U.S.C. 832(b) to determine whether respondent's continued access to SCI was clearly consistent with the national security (App., *infra*, 3a). Based on a detailed report of the psychiatrist in response to questions from the board, the board ultimately concluded that respondent's continued access to SCI was not clearly consistent with the interests of national security (*ibid.*). The board recommended, however, that in view of respondent's satisfactory job performance the Agency assist him in finding employment outside NSA (*id.* at 3a-4a).

Respondent's counsel filed a lengthy brief (C.A. App. 121-144) together with summaries of interviews and letters from respondent's acquaintances attesting generally to his good character and trustworthiness (*id.* at 147-174, 183-190). Respondent and his counsel also had a hearing before the Director of NSA at which respondent challenged the decision to withdraw his access to SCI (*id.* at 191). Following consideration of all of respondent's submissions, the Director decided to revoke respondent's eligibility for access to SCI. Since such eligibility was a condition of respondent's job and all other jobs at the Agency, the Director, relying on the authority delegated to him under the 1959 NSA Act, ordered that respondent be removed. App., *infra*, 4a.

Respondent's counsel requested a pre-removal hearing pursuant to 5 U.S.C. 7532 (App., *infra*, 4a). This request was directed to the Secretary of Defense as well as to the Director of NSA (C.A. App. 216-219). Both NSA and the Department of Defense replied that respondent's removal was for "cause" pursuant to NSA regulations and was not pursuant to the Secretary's summary authority under

either 50 U.S.C. 833 or 5 U.S.C. 7532 (C.A. App. 220, 221). Respondent renewed his request for a Section 7532 hearing, and also contended that the appointment authority provided in the 1959 NSA Act, 50 U.S.C. 402 note, and delegated to the Director of NSA, did not include any authority to remove employees (C.A. App. 222, 223). The renewed request was denied (*id.* at 224, 225), and respondent's employment was terminated effective March 9, 1984 (*id.* at 226).

2. Respondent then filed this suit in the United States District Court for the District of Columbia contending that his removal violated various constitutional and statutory rights. He argued, inter alia, that the Director had no statutory authority to remove him under the 1959 NSA Act and that, unless the Director proceeded under NSA's special summary authority (50 U.S.C. 833), the only available statutory authority for removal was 5 U.S.C. 7532. He sought reinstatement to his job or a remand to the Agency for a full hearing at which he could challenge the decision to revoke his clearance for access to SCI.

The district court granted summary judgment for petitioners (App., *infra*, 17a-20a). The court held, inter alia, that respondent was properly removed "for cause" pursuant to the 1959 NSA Act and NSA's implementing regulations. The court concluded that the power to remove is inherent in the power to appoint, and that, although NSA could have elected to proceed under its summary authority in 50 U.S.C. 833, it was not required to do so. The court noted that NSA in fact provided respondent with greater procedural safeguards by proceeding under its "for cause" regulations than he would have received under 50 U.S.C. 833 (App., *infra*, 20a). The court concluded that NSA was similarly not required, simply because the removal implicated national security concerns, to utilize the summary procedures of 5 U.S.C. 7532 (App., *infra*, 20a).

3. The court of appeals reversed the district court's decision with respect to the applicability of 5 U.S.C. 7532

and vacated the remainder of the decision (App., *infra*, 1a-16a). The court held that, since respondent's removal was "in the interests of national security," the Secretary of Defense was required to proceed under 5 U.S.C. 7532 in removing respondent. The court reasoned that since Section 7532 predated the creation of NSA, any implied removal authority granted to NSA must be limited by Section 7532. The court of appeals stated (App., *infra*, 10a): "Whatever implicit firing authority may ordinarily be conferred by an explicit grant of hiring authority, in this case the 1959 [NSA] Act cannot override a congressional statute that expressly controls terminations in the interest of national security." The court noted that Congress had subsequently provided NSA with an explicit statutory removal authority (50 U.S.C. 833), but since NSA did not use that authority, the only means of removing respondent in the interests of national security was Section 7532. The court therefore remanded to the agency for compliance with Section 7532.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals, that an employee who fails to maintain a required eligibility for access to classified information may not be dismissed for cause, but may only be dismissed by the head of his agency under 5 U.S.C. 7532 or other summary procedure, is important to all federal agencies concerned with national security. The court of appeals has seriously misconstrued both 5 U.S.C. 7532 and the set of statutes governing NSA employment and access to classified NSA information. Its decision also conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), cert. granted, No. 86-1552 (May 26, 1987).

1. In the 1959 NSA Act, 50 U.S.C. 402 note, Congress granted to the Secretary of Defense, who in turn delegated to the Director of NSA, the authority to administer and direct the operations of NSA, specifically including the power "to establish such positions and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency." As a general matter, the power to fire is, unless expressly circumscribed, inherent in the power to hire. The district court correctly so noted (App., *infra*, 20a), and this Court has so recognized for 150 years. *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Crenshaw* v. *United States*, 134 U.S. 99, 108 (1890); *Keim* v. *United States*, 177 U.S. 290, 293-294 (1900); *Shurtleff* v. *United States*, 189 U.S. 311, 315 (1903); *De Castro* v. *Board of Comm'rs*, 322 U.S. 451, 462 (1944); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961); *Arnett* v. *Kennedy*, 416 U.S. 134, 148 (1974) (plurality opinion); *id.* at 181 (White, J., concurring in part and dissenting in part).[6]

Clearance for access to SCI is a continuing requirement for employment at NSA, and loss of that clearance plainly constitutes "cause" for removal.[7] Section 831 provides that "no person shall be employed in * * * the National Security Agency * * * *or continue to be so employed* * * *

---

[6] NSA employees are not covered by the civil service laws. However, as noted above, the Director has promulgated regulations granting to NSA employees substantive and procedural rights similar to those enjoyed by their counterparts in the civil service. These include the right to be dismissed "only for such cause as will promote the efficiency of the service." NSA/PPM § 370.3-4.

[7] Loss of a required clearance is also cause for removal under the parallel provisions of the CSRA. *Egan* v. *Department of the Navy*, *supra*; *Hoska* v. *Department of the Army*, 677 F.2d 131 (D.C. Cir. 1982). Cf. *Cole* v. *Young*, 351 U.S. at 543 (footnote omitted) ("[t]he general personnel laws * * * authorize dismissals 'for such cause as will promote the efficiency of the service,' and * * * a reasonable doubt as to an employee's loyalty was recognized as a 'cause' for dismissal under those procedures as early as 1942").

[or] have access to any classified information[ ] unless such employment * * * or access to classified information is clearly consistent with the national security" (emphasis added). Section 832(a) provides that "[n]o person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this subchapter."

Sections 831 and 832 authorize, and NSA's regulations establish, procedures by which it may be determined that an existing employee's access to SCI is no longer "clearly consistent with the national security"—with the consequence that the employee must be removed. Section 831 directs the Secretary to prescribe regulations "relating to continuing security procedures" sufficient to assure that an individual's "continue[d]" employment is clearly consistent with the national security. The Secretary promulgated such regulations and NSA followed them here. Section 832(b), which applies to continuing as well as initial clearance determinations,[8] provides that, "in those cases in which the Director of the Agency determines that there is a doubt whether [the employee's] access to that information would be clearly consistent with the national security," a board of appraisal "shall submit a report and recommendation on each such a case." Section 832(b) further provides that no person may be cleared for access to classified information "contrary to the recommendations of any

[8] Section 832(b) establishes procedures for "assist[ing] the Secretary and the Director of the Agency in carrying out their personnel security responsibilities," responsibilities which are defined in Section 831 to include ensuring that no employee at NSA shall "continue to be so employed" and have access to classified information unless such continued employment and access is "clearly consistent with the national security."

such board" unless the Secretary or his designee "shall make a determination in writing that such employment * * * or access to classified information is in the national interest."

2. Neither the language nor the history of 5 U.S.C. 7532 supports the court of appeals' conclusion that Section 7532 displaces the authority of the Director to remove an employee for cause for failure to maintain a clearance that is a requirement of his job. Section 7532 is plainly not an exclusive procedure but an extraordinary supplement to the usual methods of removing federal employees. Section 7532 gives each agency head responsible for protecting national security—here, the Secretary of Defense—certain summary suspension and removal powers when he has made an affirmative determination that such action is necessary or advisable in the interests of national security. Neither the interests of national security nor the interests of employees would be served by turning it into a mandatory substitute for normal removal procedures.

Congress enacted the predecessor of Section 7532 (the Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476) to give the heads of certain executive agencies the power to take immediate action when necessary to protect the national security. See, *e.g.*, S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950). See also H.R. Rep. 2264, 80th Cong., 2d Sess. 1 (1948). From the standpoint of both the agency head and the affected employee, it is a drastic remedy. The agency head must act personally and must make affirmative findings that a suspension is "necessary" and then that a removal is "necessary or advisable" in the interests of national security. But the employee may be suspended summarily, without process and without pay, and may be removed "after such investigation and review as [the agency head] considers necessary." Permanent employees are entitled, "after suspension and before removal," to notice of charges "as specific[] as security considerations permits," an opportunity to respond, and a hearing "by an

agency authority duly constituted for this purpose." 5 U.S.C. 7532. The statute provides that "[t]he determination of the head of the agency is final" (5 U.S.C. 7532(b)), *i.e.*, there is no outside review (*Cole* v. *Young*, 351 U.S. at 546). An employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government prior to consultation with OPM (5 U.S.C. 7312).

Section 7532 was not intended to be used routinely, but only when there is an immediate and apparent risk to the national security. See H.R. Rep. 2330, 81st Cong., 2d Sess. 3 (1950). See also *Cole* v. *Young*, 351 U.S. at 546. The proponents of the statute gave assurances that it would be used sparingly and cautiously. See, *e.g.*, *Hearings on S. 1561 Before a Subcomm. of the Senate Comm. on Armed Services*, 80th Cong., 1st Sess. 2, 3 (1948) (statement of Mark Edwin Andrews, Assistant Secretary of the Navy: "It is our intention to utilize the provisions of this law only in the exceptional cases where no other speedy and sure method is available to protect the national security. * * * I wish to reemphasize that the Navy does not intend to use this summary-dismissal legislation * * * except in the most unusual cases.").

For these reasons, this Court noted in *Cole* v. *Young*, 351 U.S. at 543, that the summary removal authority granted to agency heads by the predecessor of Section 7532 is "not the only, nor even the primary, source of authority to dismiss Government employees." In *Cole*, the Court held that, "[i]n the absence of an immediate threat of harm to the 'national security,' " a removal based on doubts about an employee's loyalty should proceed not under Section 7532 but under "the normal dismissal procedures" (351 U.S. at 546). That is precisely what happened in this case, and the court of appeals erred in concluding that the possibility of summary termination under Section 7532 somehow precluded a "for cause" removal of respondent.[9]

3. The court of appeals' decision is simply irreconcilable with the statutory mandate that "no person shall be employed in" the Agency or have "access to any classified information" unless such employment or access is "clearly consistent with the national security" (50 U.S.C. 831). If the employee fails to meet that "clearly consistent" standard and hence is no longer permitted by statute to have access to classified information, the statute requires that his employment not continue (*ibid.*). Removal under Section 7532, by contrast, requires an affirmative finding that

---

[9] That Congress intended to allow "for cause" removal on national security grounds is clear from the preamble to 50 U.S.C. 833, which grants the Secretary of Defense summary authority to dismiss an employee in the interest of the United States. Section 833 provides that the Secretary's authority may be exercised "[n]otwithstanding sections 7512 and 7532 of title 5." The reference to 5 U.S.C. 7512 is to the "for cause" dismissal protections of the CSRA, protections which have been afforded by regulation to NSA employees. The reference to both Section 7512 and Section 7532 clearly indicates that Congress assumed that removals for cause would continue to occur even in cases with national security implications. See also 50 U.S.C. 832(b) (authorizing boards of appraisal to submit reports and make recommendations on access to classified information, but providing that "appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law").

Section 833 requires a finding by the Secretary of Defense both that the action is "in the interest of the United States" and that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security" (50 U.S.C. 833(a)). The latter clause further demonstrates that 50 U.S.C. 833 does not displace the general authority of the Director to remove employees for cause, merely because the case implicates national security.

removal is "necessary or advisable in the interests of national security." That is a different standard: a determination to deny access to SCI, on the ground that it is no longer "clearly consistent with the national security," does not necessarily mean there is an immediate danger to national security sufficient to invoke Section 7532. It does, however, mean that the employee no longer satisfies a statutory condition of his employment.

4. The court of appeals apparently reasoned (App., *infra*, 12a-13a) that respondent would receive more protection under Section 7532 than in a "for cause" removal, and that therefore the former procedure must displace the latter. But the premise is wrong and the conclusion does not follow: respondent received greater protection under NSA regulations than he would have received had Section 7532 been invoked; and the fact that NSA employees are statutorily excluded from civil service protection does not turn Section 7532, a supplementary procedure applicable to a wide range of federal employees, into an exclusive means of removing NSA personnel.

Under NSA regulations, respondent could be removed only for cause and was entitled to written notice, an opportunity to respond and be represented by counsel, and a written decision. His case was reviewed, first, by a board of appraisal and then by the Director of NSA, who met with respondent and his counsel. Had respondent been a veteran, he would also have had a right to appeal to the MSPB (see p. 4, *supra*). Respondent was kept on pay status for a period of 16 months while his case was being considered. When the board of appraisal determined that respondent's access to SCI was no longer "clearly consistent with the national security," it nonetheless recommended that NSA endeavor to help respondent find employment elsewhere.[10] This treatment contrasts sharply

[10] Although all positions at NSA require SCI clearance, that is not true elsewhere in the Department of Defense or in other agencies.

with what respondent could have expected under Section 7532, which is designed primarily to deal with immediate threats to national security: summary suspension without pay, notice only to the extent consistent with national security, a single hearing of unspecified scope, and, if the determination were made to remove him, ineligibility for any other position in the Department of Defense or, prior to consultation with OPM, for appointment elsewhere in government. NSA employees would be ill-served if Section 7532 became the standard procedure for all removals based on considerations of national security.

In any event, the fact that NSA personnel have no civil service protection does not imply that Section 7532 is the exclusive means of removing them. Section 7532 applies to employees of many agencies (see n.5, *supra*), including employees in the competitive service, who do have civil service protection and who receive statutory protections in a "for cause" removal that they do not receive when Section 7532 is invoked.[11] The emergency procedure permitted by Section 7532 does not become a mandatory procedure just because personnel of a particularly sensitive agency have been deliberately shorn of statutory protection and relegated to such protections as the agency provides by regulation.

5. The court of appeals' ruling has an importance that extends well beyond NSA. The court ruled that a general

[11] For example, a competitive service employee or veteran removed for cause for failure to obtain or retain a required security clearance is entitled, under 5 U.S.C. 7513, to MSPB and judicial review in addition to agency procedures. See *Egan* v. *Department of the Navy*, *supra*. We argue in that case that the substance of the clearance determination is not reviewable, but this outside check on the procedures followed by the agency offers a protection wholly unavailable under Section 7532.

authority to remove employees for cause is displaced in cases involving national security by 5 U.S.C. 7532. The opinion suggests no reason why that ruling should not apply to other agencies with general "for cause" removal authority.[12] If it does, then every routine decision to revoke a required clearance would require procedures suitable to an immediate threat to national security, including the personal attention of the head of the agency. Even if the "necessary or advisable" standard of Section 7532 could be stretched to accommodate such cases (as would be necessary if the "clearly consistent" test of 50 U.S.C. 831 and other statutes is to be complied with), the burden upon the agencies and consequent inefficiency would greatly handicap efforts to protect the national security.[13]

---

[12] The court of appeals did note that Section 7532 predates the NSA Act of 1959, but statutes are normally more easily read to displace prior enactments than subsequent ones.

[13] Two additional points should be noted. First, the line of distinction between dismissals implicating national security and those which "promote the efficiency of the service" in other ways is far from clear. For example, an employee found selling drugs could be dismissed for cause to promote the efficiency of the service. Yet drug trafficking is presumably also grounds for revoking a security clearance because the continued access to classified information by such an employee would seem not to be "clearly consistent with the interests of the national security." It is not clear whether the court of appeals' decision would require the agency to proceed under Section 7532 in such a case.

Second, mandatory resort to Section 7532 could cause some of the very security problems the section was designed to alleviate. In the above example, the Director might be legitimately concerned that suspension of the employee without pay (under Section 7532) would

Finally, the court of appeals' holding is in direct conflict with the conclusion of the Federal Circuit in *Egan* v. *Department of the Navy, supra*, that an agency may remove an employee for cause, for failure to hold a required security clearance, without invoking Section 7532. Although, as noted (see n.1, *supra*), issue is not joined in this Court on that question in *Egan*, the question was fully considered and expressly decided by the Federal Circuit, and it is the logical antecedent to the question presented by the petition in that case. If the Navy had no authority to dismiss Egan for cause after denying him a security clearance, then the question presented in *Egan*—the scope of MSPB review of the dismissal—would not have arisen.

We believe the Court should grant certiorari in this case and, after plenary review, reverse the decision below. However, briefs in chief have been filed in *Egan*, and argument has been scheduled for December 2, 1987. Under the circumstances, since the Federal Circuit's contrary view on the issue presented in this case is a predicate for the issue presented in *Egan*, the Court may wish to defer consideration of this petition pending the Court's decision in *Egan*.

---

cause the employee to react by disclosing highly sensitive information in retaliation. By adjudicating the employee under the "for cause" procedures established by NSA regulations, with attendant procedural protections and the employee enjoying full pay but denied further access to classified information, the Agency may be able to defuse any such impulse. While the Agency does not dispute that it *could* proceed under Section 7532 in such a case, it vigorously disputes that it *must* do so, since a mandatory procedure undermines its ability to protect national security when it believes that the summary procedures might cause greater risk to national security than a for cause dismissal.

CONCLUSION

The petition for a writ of certiorari should be granted either now or after the Court's decision in *Department of the Navy* v. *Egan*, No. 86-1552.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

NOVEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Argued February 13, 1987
Decided June 9, 1987

Opinion for the Court filed by *Chief Judge* WALD.

Before: WALD, *Chief Judge,* BORK and SILBERMAN, *Circuit Judges.*

WALD, *Chief Judge*: Is an employee of the National Security Agency (NSA) entitled to a hearing under 5 U.S.C. § 7532 before being fired from his job even though a security clearance is a prerequisite for employment at the agency and the agency has revoked his clearance pursuant to statutory authority under 50 U.S.C. §§ 831-32? We hold that Congress did not intend its delegation of authority to revoke security clearances in one statute to negate the pre-termination hearing requirement contained in the other and that, accordingly, an employee has a right to administratively challenge the basis for his security clearance revocation in that pre-termination hearing.

I. FACTUAL BACKGROUND

The National Security Agency is part of the Department of Defense. Its functions include intercepting and analyzing the communications of foreign governments with the use of highly sophisticated technology. Because of its nature, the work conducted at NSA has been designated "Sensitive Compartmented Information," which is a level of classified information above "Top Secret."

Appellant was employed at NSA as a Cryptographic Material Control Technician. The duties of this position are not entirely clear to us. The government's definition is essentially tautological: "a Cryptographic Material Control Technician performs a variety of procedural functions concerned with the physical control and distribution of cryptologic material in accordance with Agency guidelines, policies, and regulations." Appellee's Brief at 7 n.10. At any rate, the relevant point is that an employee in this position has access to information designated as SCI. Appellant, therefore, had to attain a security clearance for access to this information in order to be employed at his job.

In March 1982, appellant voluntarily revealed to the NSA security officials that he had engaged in homosexual relations with several unknown individuals, presumably foreign nationals, during vacation travels abroad. Later on, he declared that in July 1982 he again had a homosexual liaison with an unknown individual while visiting the Dominican Republic. Based on these disclosures, the NSA Director referred the question of whether appellant should be allowed continued access to SCI to a "board of appraisal" as provided in 50 U.S.C. § 832(b).

In order to defend himself against the charge that he was psychologically unstable and therefore a security risk, appellant suggested to NSA officials that he voluntarily submit to psychiatric evaluation. The NSA officials agreed to an evaluation conducted by a psychiatrist selected by

the NSA. *See* Joint Appendix (J.A.) at 102. The psychiatrist concluded that appellant suffered from a case of "mixed anxiety and depression," characterized as "mild." *Id.* at 105 (emphasis omitted). The psychiatrist also stated that "[t]he reported . . . shallowness of most recent friendships and 'lack of friends' suggest difficulties with intimacy," but acknowledged that "[t]his diagnosis cannot be firmly established without more extensive clinical interviewing and psychological testing." *Id.* The psychiatrist noted that appellant's homosexuality "is not considered a mental disorder." *Id.*

The board of appraisal reviewing appellant's clearance requested additional information concerning appellant's emotional stability, judgmental maturity, loyalty, and "potential trustworthiness in relation to national security practices." *Id.* at 110. The psychiatrist responded without conducting any additional interviewing or testing. In his second report, the psychiatrist stated:

> In my opinion [appllant] [*sic*] is living in a state of precarious emotional balance . . . .
>
> . . .
>
> . . . I believe that anyone as emotionally starved as he is for relationships, will become more vulnerable to offers of friendship and more at risk of developing unwise attachments to individuals, than would be the case for a more mature and well-adjusted individual with satisfying interpersonal relationships.

Id. at 111-12.

The board of appraisal acknowledged that it relied heavily on the psychiatrist's second report in reaching its conclusion that appellant's access to SCI was "clearly inconsistent with the national security." *Id.* at 108. The board recommended to the Director that he terminate appellant's employment at NSA, but that in light of appellant's satisfactory job performance, the NSA assist him

in finding a new job outside the NSA. The board also stated that it "took note of information concerning [appellant's] admitted homosexual/bisexual preference, but did not judge it to be material in and of itself to the Board's decision." *Id.*

The Director of the NSA accepted the board's recommendation to terminate appellant's appointment at NSA:

> [Appellant's] attorneys argue that the Board of Appraisal seems to rely almost entirely on the 10 May 1983 [psychiatric] assessment which they assert is inconsistent and contradictory with his 12 February 1983 report which they further argue was favorable to their client. I would certainly concede the first report was less damaging (albeit not exactly favorable), but I consider the second report more valuable because it was better focused. Although the same interview data provided both evaluations, the second was in response to . . . specific questions which help [the psychiatrist] to orient his analysis. When he does so, he portrays a potentially unstable individual who is of concern to me irrespective of sexual preference.

Id. at 191-92. With respect to appellant's promiscuous homosexual acts, the Director stated: "Frankly, it is the indiscriminate pattern of activity which invites the risk of security exploitation rather than the specific homosexuality of it." *Id.* 192. The Director notified appellant of the decison to remove him on the grounds that appellant's access to SCI was "not clearly consistent with the national security." *Id.* at 193.

In response to this decision, appellant petitioned the Secretary of Defense arguing that he had a right to a hearing under 5 U.S.C. § 7532 before being removed from his NSA position. After the Secretary of Defense denied his petition, appellant brought this action in the District Court for the District of Columbia. In addition to claiming that the denial of a hearing contravened congressional

command, appellant argued that the government violated the constitutional requirement of procedural due process. The appellant also brought substantive challenges against the decision to revoke his security clearance and terminate his employment at NSA. Appellant complained that the decision was "arbitrary" and "capricious" and therefore must be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). And notwithstanding the assertions of the board of appraisal and the Director to the contrary, appellant also claimed that their decisions were motivated by an unconstitutional prejudice against homosexuals.

The District Court granted the government's motion for summary judgment. The court stated that "even if the termination was premised solely on plaintiff's homosexuality, the agency's decision to withdraw plaintiff's access to SCI and thereafter terminate him is rationally related to a permissible purpose." J.A. at 34. The court also rejected appellant's other legal contentions. This appeal followed.

II. ANALYSIS OF THE RELEVANT STATUTORY SCHEME

Several statutes bear on the resolution of this case. First, in 1950 Congress passed a law regulating the removal of employees from certain federal agencies, including the Department of Defense, for reasons of "national security." Act of August 26, 1950, 64 Stat. 476. While the statute grants the head of the relevant agency (in our case, the Secretary of Defense) complete discretion to determine when such removal "is necessary or advisable in the interests of national security," it also affords employees certain pre-removal procedural protections, including an administrative hearing, and review by the agency head or a designee. This statute was subsequently reenacted, with amendments, as 5 U.S.C. § 7532 in the 1966 recodification of Title 5 of the United States Code. *See* Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 529.

Second, the National Security Agency Act of 1959, as amended, provides that "[t]he Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency." *See* Pub. L. No. 86-36, 73 Stat. 63 (codified, as amended, at 50 U.S.C. § 402 *note*). And third, in 1964 Congress enacted another statute specifically involving "Personnel Security Procedures in the National Security Agency." *See* Act of March 26, 1984, Pub. L. No. 58-290, 78 Stat. 168. This Act requires the Secretary of Defense to establish regulations

> relating to continuing security procedures . . . to assure—(1) that no person shall be employed in . . . the National Security Agency . . . or continue to be so employed . . . and (2) that no person so employed . . . shall have access to any classified information; unless such employment . . . or access to classified information is clearly consistent with the national security.

50 U.S.C. § 831. In cases of doubt boards of appraisal are authorized to recommend whether individuals should have access to classified information. *Id.* § 832(b). The Act also states:

> Notwithstanding section 7512 and 7532 of Title 5, or any other provision of law, the Secretary [of Defense] may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security.

50 U.S.C. § 833. Since the government in this case expressly disavows any reliance on the summary termination

authority in 50 U.S.C. § 833, appellant argues that he has a right to the procedural safeguards provided in 5 U.S.C. § 7352 before he is removed from his NSA position "in the interests of national security."

A. *Judicial Review of Appellant's Claim*

The first issue raised by appellant is whether § 7532 applies to this case, thereby granting him a right to a hearing prior to his removal from the NSA. Before addressing this issue, we pause briefly to note our authority to address this issue. We recognize that § 7532 states that "[t]he determination of the head of an agency is final." Although this provision precludes a court from reviewing the Secretary's judgment that "removal is necessary or advisable in the extent [*sic*] of national security," it does not preclude judicial review to the extent necessary to ensure that the Secretary, in fact, acts pursuant to the statute, including its procedural requirements. *See Cole v. Young,* 351 U.S. 536 (1956).

In this case the government relies in part on the 1964 Act to argue that appellant's dismissal does not require the procedures set forth in § 7532. We recognize that 50 U.S.C. § 835 states that the judicial review provisions of the APA "shall not apply to the use or exercise of any authority granted in [the 1964 Act]." Thus, *if* the government may properly rely on the 1964 Act to dismiss appellant without regard to 5 U.S.C. § 7532, § 835 seems to preclude any further judicial review of the agency's decision at issue in this case. Nevertheless, the basic question of whether the government may rely on the 1964 Act to bypass the § 7532 procedures remains subject to judicial resolution. *Cole* v. *Young* stands for the proposition that a reviewing court has authority to determine whether § 7532 does or does not apply to a particular dismissal. In sum, the government may not invoke the preclusion-of-judicial-review provision found in the 1964 statute, and applicable

only to agency action within the scope of that statute's delegation, to bar judicial review of the legal question whether another statute (namely 5 U.S.C. § 7532) governs the agency action in dispute.

We remain mindful, however, of the curtailment of judicial review contained in both 5 U.S.C. § 7532 and 50 U.S.C. § 835. The scope of our review in this case is very limited, indeed. We will decide only the question of whether appellant was entitled to the procedures specified in 5 U.S.C. § 7532, because the agency declined to invoke the authority of 50 U.S.C. § 833.

B. *The Applicability of the § 7532 Procedural Requirements*

By its own terms, § 7532 applies to appellant's dismissal. Appellant was an employee of an agency covered by the statute, the Department of Defense, of which NSA is a part. The agency's own justification for revoking appellant's security clearance and terminating his employment at NSA was "national security," within the meaning given that term by the Supreme Court. *See Cole* v. *Young, supra;* J.A. at 108, 192. Appellant held an "indefinite appointment" at NSA, had long since completed his probationary period, and is a United States citizen. 15 U.S.C. § 7532(c)(1)-(3).

The government, however, argues that the procedures of § 7532 are "neither mandatory nor exclusive," Brief of Appellees at 44, *i.e.*, that if an agency covered by § 7532 can properly rely on some other statutory authority to fire an employee and this alternative statutory authority allows the government to grant an employee less procedural protections than § 7532, then the agency need not abide by the procedures set forth in § 7532. This argument, however, appears to contradict the express language of the statute and its legislative history. Congress explicitly provided that § 7532 does not impair other pre-existing statutory authority for the dismissal for security reasons of one

specific agency, *i.e.*, the Atomic Energy Commission. *See* 5 U.S.C. § 7533. But Congress did not provide any equivalent provision for any other agency covered by § 7532. Indeed, the House Report states:

> Under the present law, with respect to [the Departments of State and Defense,] the officer or employee who is suspended or terminated as a security risk is not entitled as a matter of right to an appeal to the head of the agency concerned. This legislation extends this appeal right to employees [of these agencies.]

H.R. Rep. No. 2330, 81st Cong., 2d Sess. 3 (1950). This history, it seems to us, effectively shoots down the theory that § 7532 is only an extra option for agencies wishing to fire employees as national security risks.

But even if we accepted the government's theory, it still could not avoid the applicability of § 7532 to appellant's dismissal. The government would have to point to an alternative statutory authority that would allow the Secretary of Defense to bypass the § 7532 procedures. The two statutes which the government proffers for this purpose do not suffice. Both these statutes were enacted *after* the statute now codified as § 7532 and therefore cannot be considered to be part of a pre-existing termination authority that Congress did not wish to supplant. Furthermore, neither statute contains a provision of termination authority that renders § 7532 inapplicable to this case.

1. *The 1959 Act*

The National Security Agency Act of 1959 makes no mention of the removal of NSA employees. Yet the government contends that by authorizing the Secretary of Defense to hire NSA employees, the Act necessarily grants

him the counterpart authority to fire them. Further, according to the government's theory, because this implicit termination authority is uncurtailed by any procedural limitations, appellant has no statutory right to a hearing.

Whatever implicit firing authority may ordinarily be conferred by an explicit grant of hiring authority, in this case the 1959 Act cannot override a congressional statute that expressly controls terminations in the interests of national security. Were we to follow the government's train of logic, inferences to be drawn from the 1959 Act would render the explicit mandate of 5 U.S.C. § 7532 entirely nugatory with respect to NSA employees. The Secretary of Defense could rely on an inherent termination authority, whose contours are not delineated, indeed whose existence is not even acknowledged in any Act, to fire an NSA employee without any of the procedural restraints set out in § 7532, which includes NSA termination. The government's interpretation would effectively amount to a repeal of § 7532 by implication, something that courts are traditionally most reluctant to endorse. *See, e.g., FAIC Securities, Inc.* v. *United States,* 768 F.2d 352, 362 (D.C. Cir. 1985).

2. *The 1964 Act*

The government also contends that the § 7532 procedures are inapplicable to appellant's dismissal because he was removed from NSA employment pursuant to a rule that no person may be employed at NSA without a security clearance for access to SCI. The government points to the 1964 Act as statutory authority for this administrative rule. *See* Appellee's Brief at 4 & n.5. But even if we assume that the 1964 Act authorizes this rule, the government's effort to escape the § 7532 procedures must fail. As we will explain, the 1964 Act does not negate the applicability of § 7532 to decisions to remove individuals from NSA employment for national security reasons, except as pro-

vided in 50 U.S.C. § 833. Therefore, an administrative rule authorized by the 1964 Act (but not an application of § 833) cannot suspend the procedural requirements of § 7532.

The 1964 Act requires the Secretary of Defense to develop "continuing security procedures" to assure that no person employed at NSA has access to classified information or remains employed at NSA unless the access to classified information or employment is "clearly consistent" with national security. 50 U.S.C. § 831. But the procedures required by this statute for clearance revocation do not supersede the procedures specified in 5 U.S.C. § 7532 for termination. Section 831 appears to call for periodic checks designed to detect and thwart emerging security risks at NSA. Congress obviously did not intend to hamper such routine security checks by requiring any specific procedural prerequisites. But there is nothing in § 831 to suggest that if, as a result of such investigations, an NSA employee is faced with the loss of the job, the NSA may automatically bypass the administrative hearing laid down in § 7532.

In fact, the 1964 Act explicitly makes a distinction between the procedures governing security clearance decisions and the procedures governing employment terminations as provided in 5 U.S.C. § 7532. The section of the 1964 Act that establishes boards of appraisal to assist in security clearance decisions states that "appraisal by such a board is not required before action may be taken under section[] . . . 7532 . . . ." 50 U.S.C. § 832(b). Congress would not have needed to include such a provision if a decision to revoke an NSA employee's security clearance could result automatically in the termination of the individual's employment at NSA. This provision expresses congressional recognition that separate proceedings to revoke security clearance and terminate an employee's

employment may be overly time-consuming and repetitive. To allow the agency to expedite matters, Congress provided that the agency may bypass the clearance revocation proceedings and go straight to the removal proceedings under § 7532. Congress, however, did not allow the agency to revoke an employee's security clearance pursuant to § 832(b) and then subsequently dispense with the procedures for dismissing the employee under § 7532.

Indeed, the only section of the 1964 Act governing dismissals from NSA employment expressly indicates that § 7532 applies except in the most limited circumstances. This section states that "[n]otwithstanding section [] . . . 7532 of Title 5 . . . the Secretary may terminate the employment of any [NSA employee] whenever . . . he determines that the procedures prescribed [therein] cannot be invoked consistently with the national security." 50 U.S.C. § 833. By specifically mentioning 5 U.S.C. § 7532 in this way, 50 U.S.C. § 833 makes clear that the 1964 Act did not render § 7532 automatically inapplicable to the dismissal of NSA employees. Rather, the statute provides that § 7532 will continue to govern the removal of NSA employees *unless and until* the Secretary of Defense makes a determination in a given case that even the minimal § 7532 procedures are not consistent with national security.

Moreover, 50 U.S.C. § 833 confirms that the 1959 Act did not repeal by implication § 7532 with respect to NSA employees. Contrary to the government's assertion, the 1959 Act did not grant the Secretary of Defense an implicit authority to fire an NSA employee in the interest of national security summarily, without even the minimum hearing stipulated in § 7532. Rather, in 1964, Congress granted the Secretary the explicit authority to dispense with the § 7532 hearing, but only when national security requires such summary dismissals. The government's construction of the 1959 Act, in addition to rendering § 7532 entirely nugatory, would render § 833 entirely superfluous.

Thus, in enacting § 833, Congress made plain that neither the 1959 Act nor the 1964 Act by its own force suspends the procedural rights granted by § 7532. These procedures control the removal of individuals from NSA employment except in those limited circumstances when national security requires that even these procedures be eliminated. As the government acknowledges, in this case the Secretary has not found that a § 7532 hearing would itself contravene national security. Accordingly, appellant is entitled by law to that hearing.

C. *Hearing Options Available to the Secretary Under the Current Statutory Scheme*

We point out at this juncture that our holding will not necessarily require the agency to "relitigate" *de novo* in the § 7532 proceedings the same issues already decided by the NSA Director pursuant to 50 U.S.C. § 832 (b). We note as well that any duplication in process that does result is of the agency's own making. It has established an administrative rule mandating that revocation of SCI clearance automatically results in dismissal. But it has not availed itself of the means Congress expressly provided in § 832(b) for avoiding procedural duplication, through bypassing the security clearance revocation proceedings and going directly to the § 7532 proceedings for a determination of whether removal is necessary or advisable in the interests of national security.

In addition, even if the Secretary wishes to rely on the expertise of the boards of appraisal in making the initial clearance revocation decision, the Secretary could still avoid duplication of process by vesting the predetermination hearing authority in those same boards of appraisal. Section 7532 requires only that the hearing be conducted

"by an agency authority duly constituted for this purpose." The Secretary could then choose the NSA Director as his "designee" to review the board's termination conclusion under 5 U.S.C. § 7532, just as he has chosen the NSA Director as his designee for making security clearance decisions under § 832(b). *See* J.A. at 62. Under § 7532, the Secretary may not delegate his duty to make the final removal decision or his duty to supply the dismissed employee with a written statement of this decision. But since § 7532 would allow the Secretary to base his final decision on the review conducted by the NSA Director, one board of appraisal proceeding for making termination as well as clearance decisions would suffice. As long as the boards of appraisal conduct the hearing specified in § 7532 before they recommend that an employee be dismissed from NSA employment because of a lack of access to SCI, the Secretary would satisfy the congressional demand that the employee receive an administrative hearing and review to contest dismissal as a national security risk.

The Secretary of Defense, however, has chosen to keep termination proceedings under § 7532 separate from security clearance proceedings under § 832(b). He has not delegated the § 7532 hearing or review authority to the NSA Director or to NSA administrative bodies. *See* J.A. at 62, 230. While the Secretary is well within his authority to keep these proceedings separate, he cannot subsequently complain that their separation causes duplication and, on this basis, deny appellant his right to a § 7532 hearing. Once the Secretary has chosen, through the NSA Director, to institute a board of appraisal proceeding to assess appellant's continued access to SCI, but has not chosen to use the same board of appraisal to conduct the § 7532 hearing, the Secretary must grant appellant a separate § 7532 hearing, even at the risk of duplicating the earlier

proceedings. We leave to the Secretary the initial determination of what the precise scope of this hearing should be.

III. APPELLANT'S REMAINING CLAIMS: APPLICATION OF THE EXHAUSTION DOCTRINE

Since we hold that appellant has a right to a hearing under 5 U.S.C. § 7532, we need not address his other claims at this time. *See Vitarelli* v. *Seaton,* 359 U.S. 535, 540 (1959). The possibility always exists that in the course of this hearing the Secretary of Defense will reverse the earlier agency decision, and appellant must exhaust this administrative remedy before seeking further judicial review. Judicial reliance on the exhaustion doctrine is appropriate when a plaintiff raises a constitutional issue that may not have to be decided if relief is obtained in the administrative proceedings. *See Ticor Title Insurance Co.* v. *Federal Trade Commission,* 814 F.2d 731, 738-40 (D.C. Cir. 1987) (opinion of Edwards, J.).

The remaining claims raised by appellant in this case, including his constitutional claims, may also be subject to the argument that they are immune from judicial review by either § 7532 or § 855. *Cf. Department of Navy* v. *Egan,* 55 U.S.L.W. 3792 (1987), *granting cert. to* 802 F.2d 1563 (Fed. Cir. 1986) (question presented: whether Merit Systems Protection Board, in course of reviewing removal of employee for failure to maintain required security clearance, may review substance of underlying decision to revoke the clearance). Were we to consider these claims at this time, we would have to confront the thorny issue of whether statutes that explicitly curtail judicial review of certain administrative decisions were intended to preclude judicial review of constitutional claims; and should we find such an intent, the even pricklier question of whether this preclusion of judicial review was itself

constitutional. *See Bartlett* v. *Bowen,* No. 85-5233 (D.C. Cir. March 17, 1987), *vacated and rehearing en banc granted,* ____ F.2d ____ (June 5, 1987). These are certainly not issues that courts should decide when the exhaustion of administrative remedies may obviate the need for their resolution.

In this case, the District Court proceeded to decide appellant's claims without even considering whether or not a judicial determination of these claims was proper. Consequently, we vacate the decision of the District Court concerning appellant's remaining claims.

CONCLUSION

Because we hold that appellant is entitled to an administrative hearing under 5 U.S.C. § 7532, we reverse the contrary decision of the District Court. Because appellant must exhaust the § 7532 process before seeking further judicial review, we vacate the remainder of the District Court's decision, without expressing any opinion on the ultimate disposition of appellant's remaining statutory and constitutional claims. Finally, we remand this action to the District Court for an appropriate order directing the Secretary of Defense to act pursuant to 5 U.S.C. § 7532.

Reversed in part, vacated in part, and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1996

JOHN DOE, PLAINTIFF

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed Apr. 25, 1986]

MEMORANDUM

This lawsuit, brought by a former employee of the National Security Agency ("NSA"), challenges plaintiff's termination from employment with NSA. Plaintiff DOE was removed from his position at NSA effective March 9, 1984, because his access to classified information, a statutory condition of employment with NSA, was withdrawn. Plaintiff alleges that his statutory and constitutional rights were violated in withdrawing his access to classified information, and terminating his employment.

Specifically, plaintiff claims that the agency's reliance on plaintiff's own statements regarding his homosexual past was improperly used by NSA to withdraw his security clearance. Plaintiff further alleges that the statutory scheme utilized by NSA to terminate plaintiff was improper and that the agency was required to invoke the provisions of 5 U.S.C. § 7532 instead. The matter is before the Court on defendants' motion for judgment on the pleadings or in the alternative motion for summary judgement, and plaintiff's cross-motion for summary judgment.

After reviewing the extensive legal memoranda and hearing oral argument on these motions, this Court has determined that there are no material facts in dispute and that the case is ripe for decision.

I.

Pursuant to 50 U.S.C. § 832 all NSA employees must be eligible for a clearance for access to Sensitive Compartmented Information or SCI. NSA determined that plaintiff's access to SCI was no longer consistent with the national security and that finding mandated plaintiff's dismissal from the agency. In reaching the decision to terminate his employment, the agency provided plaintiff with notice of the reasons for the proposed action. Plaintiff was also provided with the opportunity to make written and oral presentations to the agency prior to his termination.

Plaintiff challenges his termination on both statutory and constitutional grounds. With respect to his constitutional claims, plaintiff contends that the agency's decision violated his constitutional rights to privacy, due process and equal protection. Defendants contend that the Court cannot review these claims because plaintiff has no fifth amendment liberty or property interest, and that the Constitution provides no special protection for homosexuals. Plaintiff's statutory claims are that the Director of NSA lacks the authority to terminate plaintiff under Pub. L. No. 86-36, National Security Agency Act of 1959, 50 U.S.C. § 402 *note* (West Supp. 1984), and that his termination should have taken place pursuant to separate statutory procedures applicable to removals necessary in the interests of national security, which are set forth in 5 U.S.C. § 7532. Defendants argued that the authority to terminate employment under 50 U.S.C. § 402 has been duly delegated to the Director of NSA, that terminating

plaintiff under § 402 was proper, and that the procedures established in 5 U.S.C. § 7532 are not mandatory.

II.

In considering plaintiff's claim that NSA's consideration of his homosexual conduct as a basis for withdrawing his access to SCI violates his rights of privacy and equal protection under the law, the Court is bound by *Dronenberg* v. *Zech,* 741 F.2d 1388 (D.C. Cir.), *rehearing en banc denied,* 746 F.2d 1579 (1984), in which this Circuit held that the Constitution provides no special protection for homosexuals. While defendants dispute that plaintiff's termination was based solely on his acknowledged homosexual conduct, this Court finds that even if the termination was premised solely on plaintiff's homosexuality, the agency's decision to withdraw plaintiff's access to SCI and thereafter terminate him is rationally related to a permissable purpose and, therefore, lawful.

The Court also finds that plaintiff's due process claims are without merit because plaintiff, as an employee excepted from the protections of the Civil Service Reform Act had no property interest in his job, and because the withdrawal of plaintiff's access to SCI and the resulting termination of employment, did not infringe any liberty interest.

Finally, in considering plaintiff's procedural due process claim, the Court notes that the NSA has established internal procedures applicable to termination decisions taken pursuant to Pub. L. No. 86-36. Those regulations are set forth in the NSA Personnel Management Manual at Chapter 370. The Court finds that the agency fully complied with its internal procedures by providing plaintiff with notice of the proposed adverse action, giving him a right to review the material upon which the termination was based, providing plaintiff and his attorneys with the opportunity to ma' written and oral presentations to the

agency, and providing him with written notice of the reasons for his termination.

Turning to plaintiff's statutory claims, this Court finds that the NSA Director was authorized to terminate plaintiff under Pub. L. No. 86-36, 50 U.S.C. § 402 *note*. In DoD Directive No. 5100.23, cited by the parties in their memoranda, the Secretary of Defense has delegated to the NSA Director his authority under Pub. L. No. 86-36 to terminate NSA employees. While the delegation of authority in DoD Directive No. 5100.23 refers to "establishment of positions" and "general administration of civilian personnel of the NSA", and not termination, the Supreme Court long ago established the general rule that the power of removal should be considered incident to the power of appointment which, in this case, was clearly delegated to the NSA Director. *In The Matter of Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). Finally, defendant could have instituted summary termination procedures under 50 U.S.C. § 833; but chose to proceed under the delegated authority which provided plaintiff greater procedural safeguards.

With respect to plaintiff's claim that his dismissal involved national security issues requiring the agency to utilize the procedures of 5 U.S.C. § 7532, the Court finds that use of § 7532 is not mandatory, and further finds that the agency acted properly in terminating plaintiff pursuant to Pub. L. No. 86-36.

III.

Accordingly, finding no material facts in dispute, defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied. An appropriate Judgment is filed herewith.

/s/ GEORGE H. REVERCOMB
George H. Revercomb, Judge

April 25, 1986
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1996

JOHN DOE, PLAINTIFF

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL., DEFENDANTS

[Filed Apr. 25, 1986]

JUDGMENT

This matter came before the Court on defendant's motion for judgment on the pleadings or in the alternative motion for summary judgment, and plaintiff's cross-motion for summary judgment. For the reasons stated in the Court's Memorandum of April 25, 1986, it is, by the Court this 25 day of April, 1986

ORDERED, ADJUDGED and DECREED that the motion for summary judgment of plaintiff John Doe is denied; and it is further

ORDERED, ADJUDGED and DECREED that the motion for summary judgment of defendants Casper Weinberger, Secretary, Department of Defense, and Lieutenant General William E. Odom, Director, National Security Agency, is granted; and it is further

ORDERED that each party shall bear its own costs.

/s/ GEORGE H. REVERCOMB
George H. Revercomb
United States District Judge

Dated:
April 25, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed June 9, 1987]

JUDGMENT

Before: WALD, Chief Judge, BORK and SILBERMAN, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed in part and vacated in part, and this case is remanded, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: June 9, 1987
Opinion for the Court filed by Chief Judge Wald.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

[Filed Aug. 18, 1987]

ORDER

Before: WALD, Chief Judge, BORK and SILBERMAN, Circuit Judges.

Upon consideration of appellees' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5395
(Civil Action No. 85-01996)

JOHN DOE, APPELLANT

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF DEFENSE, ET AL.

[Filed Aug. 18, 1987]

ORDER

Before: WALD, Chief Judge, ROBINSON, MIKVA, EDWARDS, Ruth B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, Circuit Judges

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellees' suggestion is denied.

Per Curiam

For The Court:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX E

Statutes and Regulations Involved

1. Title 5, United States Code, provides in pertinent part:

§ 7312. Employment and clearance; individuals removed for national security

Removal under section 7532 of this title does not affect the right of an individual so removed to seek or accept employment in an agency of the United States other than the agency from which removed. However, the appointment of an individual so removed may be made only after the head of the agency concerned has consulted with the Office of Personnel Management. The Office, on written request of the head of the agency or the individual so removed, may determine whether the individual is eligible for employment in an agency other than the agency from which removed.

* * * * *

§ 7511. Definitions; application

(a) For the purpose of this subchapter –

(1) "employee" means –

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

(2) "suspension" has the meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee –

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by –

(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

§ 7512. Actions covered

This subchapter applies to –

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to –

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1206 or 7521 of this title.

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

§ 7532. Suspension and removal

(a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the head of the agency statements or affidavits to show why he should be restored to duty.

(b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.

(c) An employee suspended under subsection (a) of this section who—

(1) has a permanent or indefinite appointment;

(2) has completed his probationary or trial period; and

(3) is a citizen of the United States;

is entitled, after suspension and before removal, to—

(A) a written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(B) an opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(C) a hearing, at the request of the employee, by an agency authority duly constituted for this purpose;

(D) a review of his case by the head of the agency or his designee, before a decision adverse to the employee is made final; and

(E) a written statement of the decision of the head of the agency.

2. The National Security Agency Act of 1959, 50 U.S.C. 402 note, provides in pertinent part:

"Sec. 2. The Secretary of Defense (or his designee for the purpose) is authorized to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees, in the National Security Agency, as may be necessary to carry out the functions of such agency. The rates of basic compensation for such positions shall be fixed by the Secretary of Defense (or his designee for the purpose) in relation to the rates of basic compensation contained in the General Schedule of the Classification Act of 1949, as amended [see 5 U.S.C. 5332], for positions subject to such Act which have corresponding levels of duties and responsibilities. Except as provided in subsections (f) and (g) of section 303 of the Federal Executive Salary Act of 1964, [see sections 5316 and 5317 of Title 5], no officer or employee of the National Security Agency shall be paid basic compensation at a rate in excess of the highest rate of basic compensation contained in such General Schedule. Not more than seventy such officers and employees shall be paid basic compensation at rates equal to rates of basic compensation contained in grades 16, 17, and 18 of such General Schedule.

"Sec. 4. The Secretary of Defense (or his designee for the purpose) is authorized to—

"(1) establish in the National Security Agency (A) professional engineering positions primarily concerned with research and development and (B) professional positions in the physical and natural sciences, medicine, and cryptology; and

"(2) fix the respective rates of pay of such positions at rates equal to rates of basic pay contained in grades 16, 17, and 18 of the General Schedule set forth in section 5332 of title 5, United States Code.

Officers and employees appointed to positions established under this section shall be in addition to the number of officers and employees appointed to positions under section 2 of this Act who may be paid at rates equal to rates of basic pay contained in grades 16, 17, and 18 of the General Schedule.

"Sec 5. Officers and employees of the National Security Agency who are citizens or nationals of the United States may be granted additional compensation, in accordance with regulations which shall be prescribed by the Secretary of Defense, not in excess of additional compensation authorized by section 207 of the Independent Offices Appropriation Act, 1949, as amended (5 U.S.C. 118h) [see 5 U.S.C. 5941], for employees whose rates of basic compensation are fixed by statue.

"Sec. 6. (a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654) [repealed by Pub. L.

86-626, title I, § 101, July 12, 1960, 74 Stat. 427]) shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

"(b) The reporting requirements of section 1582 of title 10, United States Code, shall apply to positions established in the National Security Agency in the manner provided by section 4 of this Act.

* * * * *

3. The Act of Mar. 26, 1964, Tit. III, 50 U.S.C. 831 *et seq.*, provides in pertinent part:

§ 831. Regulations for employment security

Subject to the provisions of this subchapter, the Secretary of Defense (hereafter in this subchapter referred to as the "Secretary") shall prescribe such regulations relating to continuing security procedures as he considers necessary to assure—

(1) that no person shall be employed in, or detailed or assigned to, the National Security Agency (hereafter in this subchapter referred to as the "Agency"), or continue to be so employed, detailed, or assigned; and

(2) that no person so employed, detailed, or assigned shall have access to any classified information;

unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security.

§ 832. Full field investigation and appraisal

(a) Conditional employment; other current security clearance; circumstances authorizing employment on temporary basis

No person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field

investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this subchapter; excepting that conditional employment without access to sensitive cryptologic information or material may be tendered any applicant, under such regulations as the Secretary may prescribe, pending the completion of such full field investigation: *And provided further,* That such full field investigation at the discretion of the Secretary need not be required in the case of persons assigned or detailed to the Agency who have a current security clearance for access to sensitive cryptologic information under equivalent standards of investigation and clearance. During any period of war declared by the Congress, or during any period when the Secretary determines that a national disaster exists, or in exceptional cases in which the Secretary (or his designee for such purpose) makes a determination in writing that his action is necessary or advisable in the national interest, he may authorize the employment of any person in, or the detail or assignment of any person to, the Agency, and may grant to any such person access to classified information, on a temporary basis, pending the completion of the full field investigation and the clearance for access to classified information required by this subsection, if the Secretary determines that such action is clearly consistent with the national security.

(b) Boards of appraisal; establishment; membership; appointment; appraisal in doubtful cases; report and recommendation; qualifications of members; Secretary's clearance contrary to board's recommendation

To assist the Secretary and the Director of the Agency in carrying out their personnel security responsibilities, one or more boards of appraisal of three members each, to be appointed by the Director of the Agency, shall be

established in the Agency. Such a board shall appraise the loyalty and suitability of persons for access to classified information, in those cases in which the Director of the Agency determines that there is a doubt whether their access to that information would be clearly consistent with the national security, and shall submit a report and recommendation on each such a case. However, appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law. Each member of such a board shall be specially qualified and trained for his duties as such a member, shall have been the subject of a full field investigation in connection with his appointment as such a member, and shall have been cleared by the Director for access to classified information at the time of his appointment as such a member. No person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment, detail, assignment, or access to classified information is in the national interest.

§ 833. Termination of employment

(a) Generally; finality

Notwithstanding sections 7512 and 7532 of title 5, or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

(b) Employment in other departments or agencies

Termination of employment under this section shall not affect the right of the officer or employee involved to seek

or accept employment with any other department or agency of the United States if he is declared eligible for such employment by the Director of the Office of Personnel Management.

(c) Delegation of authority; limitation

Notwithstanding section 133(d) of title 10, only the Deputy Secretary of Defense and the Director of the National Security Agency may be delegated any authority vested in the Secretary of Defense by subsection (a) of this section.

§ 834. "Classified information" defined

For the purposes of this section, the term "classified information" means information which, for reasons of national security, is specifically designated by a United States Government agency for limited or restricted dissemination or distribution.

§ 835. Nonapplicability of administrative procedure provisions

Subchapter II of chapter 5, and chapter 7, of title 5, shall not apply to the use or exercise of any authority granted by this subchapter.

4. Chapter 370 of NSA Personnel Management Manual 30-2 (Aug. 12, 1980) provides in pertinent part:

SECTION 1

AUTHORITIES AND RESPONSIBILITIES

1-1. Introduction.—This chapter covers actions which furlough employees for 30 days or less or which remove, suspend, or reduce in grade or pay, for misconduct either on or off-the-job.

1-2. Authority of the Agency.—The authority to remove, suspend, furlough, or reduce an employee's grade or pay is inherent in the Agency's appointing authority. The agency may take actions covered in the chapter only for such cause as will promote the efficiency of the service. Authority to appoint has been delegated to the Director by the Secretary of Defense as provided in DoD Directive No. 5100.23, and has been appropriately redelegated by the Director.

1-3. Responsibilities of Supervisors.—Supervisors bear primary responsibility for employees' conduct on the job and for initiating necessary corrective action. Such action may include closer supervision, counselling, training, and oral or written reprimands (PMM Chapter 366, Personnel Conduct). When corrective action of this type fails or the conduct requires more severe action, it may be necessary to process a personnel action, such as suspension or removal. In that event, the supervisor is responsible for providing full and complete information on the situation to the Director of Civilian Personnel with a recommendation as to the action proposed. In this connection, supervisors will find that PMM Chapter 366A, Supervisor's Guide in Disciplinary Matters, provides adequate guidance in determining an appropriate penalty for the offense. Supervisors should not discuss with the employee a specific contemplated action. In no instance

may adverse actions of suspension, removal, furlough, or reduction in grade or pay as discussed herein be initiated without notification of the personnel representative assigned by the Office of Civilian Personnel.

1-4. Responsibility of the Director of Civilian Personnel.—The Director of Civilian Personnel has responsibility and authority for reviewing and effecting all personnel actions involving both on-the-job and off-the-job offenses. The Director of Civilian Personnel shall consider the facts, perform or request additional investigation required to make a sound judgment, propose an appropriate action to be taken, prepare the advance notice, and forward the total case file to the Deputy Director for Management Services (DDM) for decision. The Director of Civilian Personnel shall maintain privileged personnel information concerning adverse personnel actions covered by this chapter during an individual's tenure as an Agency employee and may provide such information only to authorized personnel. Upon an employee's separation from the Agency, personnel records will be disposed of in accordance with official records disposition schedules.

1-5. Responsibility for Final Decision.—Final decisions for proposed adverse personnel actions as discussed in this chapter shall be made by the DDM.

1-6. Responsibility for the Merit Systems Protection Board (MSPB):—The MSPB has statutory appellate jurisdiction over actions based on the following for veterans preference eligible employees:

a. removal;

b. suspension for more than 14 days;

c. reduction in grade or pay; or

d. furlough for 30 days or less for lack of funds or work or other nondisciplinary reasons.

* * * * *

SECTION 3

REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH OF 30 DAYS OR LESS

3-1. Coverage.

a. Actions Covered. – This section applies to:

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less.

b. Employees Covered. – Employees covered by this section include:

(1) an individual who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, and

(2) a veterans preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions.

3-2. Exclusions. – This section does not apply to:

a. a suspension or removal taken in the interest of national security;

b. a reduction-in-force action; or

c. a reduction in grade or removal for unacceptable performance.

3-3. Definitions. – For purposes of this section:

a. *Day* means calendar day.

b. *Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

c. *Grade* means a level of classification under the NSA/CSS position classification system.

d. *Pay* means the rate of basic pay fixed by law or administrative action for the position held by an employee, and

e. *Furlough* means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

3-4. Standard for Action. – The Agency may take an action covered by this section against an employee only for such cause as will promote the efficiency of the service.

3-5. Entitlements. – An employee against whom an action is proposed under this section is entitled to:

a. at least 30 days advance written notice of the proposed action, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

b. a reasonable time, but no less than 7 days, to answer orally, in writing or both, and to furnish affidavits and other documentary evidence in support of the answer;

c. be represented by an attorney or other representative; and

d. a written decision and the specific reasons therefor at the earliest practicable date.

3-6. Procedures.

a. Notice of Proposed Action. – The notice of proposed action shall inform the employee of his/her right to review the material which is relied on to support the reasons for action given in the notice. The notice of proposed action may include but is not limited to:

(1) Person or organization to whom employee's response is to be addressed;

(2) Date response is to be submitted by employee;
(3) Amount of official time authorized employee for preparation of response;
(4) Nature of the action; and
(5) Reasons for the action.

b. Disclosure of Material.—Material which cannot be disclosed to the employee, to his/her representative, or to his/her designated physician shall not be used to support the reasons in the notice.

c. Employee's Answer.

(1) The Agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he/she is otherwise in an active duty status.

(2) The Deputy Director for Management Services or his/her designated representative shall hear the employee's reply to a proposed adverse action.

d. Exceptions.

(1) The minimum 30 days advance written notice is not required when there is reasonable cause to believe the employee has commited a crime for which a sentence of imprisonment may be imposed.

(2) The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as, sudden breakdowns in equipment, acts of God, or emergencies requiring immediate curtailment of activities.

(3) An advance written notice is not required for a suspension during the notice period of a removal or for an indefinite suspension of more than 14 days when such is required for additional investigation or when circumstances are such that retention of the employee is [*sic*] an active duty status may be injurious to the employee, fellow workers, or the general public; may result in damage to

Government property; or may be detrimental to the interests of the Government. Reasons for not retaining an employee in an active duty status during the notice period shall be included in the notice of suspension. The Agency may require the employee to answer the proposed action and to furnish affidavits and other documentary evidence in support of the answer within such time frame as is reasonable under the circumstances, but not less than 7 days. When immediate action is required, the employee may be placed in a nonduty status with pay for such time, not to exceed 10 days, as is necessary to effect the suspension.

e. Representation.—An employee covered by this section is entitled to be represented by an attorney or other representative. The employee must designate the name of the representative in writing. The Agency may disallow as an employee's representative:

(1) an individual whose activities as a representative would cause a conflict of interest or position;

(2) an individual who cannot be released from official duties because of priority needs of the Government;

(3) an employee whose release would give rise to unreasonable costs to the Government; or

(4) any person who does not possess appropriate security clearance. (The Agency will not initiate security clearance action solely for the purpose of employee representation.)

3-7. Agency Decision.—In arriving at a written decision, the DDM shall consider only the reasons specified in the notice of proposed action and shall consider any reply of the employee or his/her representative. The Agency shall deliver the notice of decision to the employee at or before the time the action becomes effective. The notice shall inform the employee of his/her appeal rights.

3-8. Appeals.

a. Appeal Rights.

(1) A veterans preference eligible meeting the requirements of paragraph 3-1*b*(2) against whom an action is taken under this section is entitled to appeal an Agency decision to the Merit Systems Protection Board.

(2) Nonveterans preference eligible employees as discussed in paragraph 3-1*b*(1) of this section are not entitled to appeal an Agency decision to the MSPB.

b. Notice of Appeal Rights. – When a decision notice is issued to an employee on a matter appealable to the MSPB, the employee shall be provided:

(1) notice of the time limits (20 days) for appealing to the MSPB and the address of the appropriate Board office for filing the appeal;

(2) a copy of the Board's regulations;

(3) a copy of the appeal form (Form MSPB 20); and

(4) notice of any appealable rights to a grievance procedure.

3-9. Filing of Petitions for Appeal.

a. Instructions for filing of petitions for appeal are contained in MSPB instructions and shall be furnished to the employee in accordance with paragraph 3-8*a* above. Veterans preference eligible employees planning to appeal an Agency decision to the MSPB should carefully review and comply with paragraphs 1201.22 through 1201.24 of the MSPB instructions.

b. The Agency has 15 days from date of receipt of request from the appropriate MSPB Field Office to provide the case record in Federal employee appeals or the MSPB will decide cases without it.

3-10. Agency Records. – Copies of the following shall be maintained by the Agency and shall be furnished to the MSPB upon its request and to the employee affected upon the employee's request:

a. notice of proposed action;

b. the answer of the employee when written, or a summary thereof when made orally;

c. notice of decision and reasons therefor, and

d. any order effecting an action covered by this section, together with any supporting material.

3-11. Agency Representation. – The NSA/CSS General Counsel shall represent the Agency on all appeals before the MSPB.

APPENDIX F

Sensitive Compartmented Information:

Characteristics and Security Requirements

June 1984

Preface

This paper on the nature of sensitive Compartmented Information (SCI) and pertinent security controls was originally produced at the CONFIDENTIAL level in March 1984. It was intended for background use by legislative liasion officers responding to Congressional inquiries about SCI security requirements. It has been redrafted for issuance as an unclassified text because SCI security recently has become a matter of interest to all three branches of Government. The concept of providing special systems of compartmented protection to entire programs of intelligence collection and production is not widely known or understood. This paper is intended to assist those who must officially consider various aspects of SCI without the benefit of extensive experience with these programs.

In the continuing discussions of the appropriate security measures for protecting Sensitive Compartmented Information (SCI), including polygraph examinations and nondisclosure agreements, there has been little or no attention to what SCI is. These discussions raise issues about SCI which include:

> Does the nature of SCI lend itself to varying levels and kinds of security protection? Is the SCI accessed by "consumers" essentially different from the SCI dealt with by "producers"? Should some individuals be subject to stricter security screening for SCI access than others? Should the personnel of agencies not engaged in collecting or producing intelligence meet the same security standards for SCI access as those of intelligence agencies? Should political appointees be required to protect SCI from disclosure in the same manner as career federal employees? Are those who are granted access to SCI required to meet a higher standard of personnel security than those cleared for non-compartmented Confidential, Secret or Top Secret information? Is there a different assessment of acceptable risk in the SCI systems than for other classified information?

This report attempts to describe what SCI is, why it is sensitive, why the revelation of SC [*sic*] that an unwary individual might consider insignificant or trival can be damaging to an entire program for SCI collection, and why we should not be willing to accept any perceptible level of risk in decisions on personnel being granted access to SCI.

Sensitive Compartmented Information is data about sophisticated technical systems for collecting intelligence and the information collected by those systems. The characteristics of the systems that necessitated the development of SCI programs are (a) that compared to conventional intelligence activities employing human sources,

many more people normally must know sensitive information in order to develop, build, and operate the systems and to analyze the material they collect; (b) that they generally produce large quantities of accurate, detailed intelligence, which is needed and relied upon by senior planners and policymakers, and which, by its nature, is extremely fragile, in that it reveals the characteristics of the systems that collect it; and (c) that they are extremely vulnerable to adversary countermeasures, i.e., denial or deception.

Most people can easily understand the need for tight security in classic espionage operations employing live agents. The need for strong security is dictated by the need for source protection and, of course, it is clear that the apprehension of an agent results in the loss of valuable intelligence. The neutralization of a technical collection system is more akin to the loss of a whole agent network that to the loss of a single agent and the loss of such systems has severe consequences. These include the loss of valuable intelligence about "denied areas" which is not available by any other means; the cost of developing and producing new technical collection systems, which are extremely expensive, state-of-the-art programs; and the risks to the national security attendant to a lack of knowledge of what our adversaries are up to.

Communications intelligence, as defined by 18 U.S.C. 798, is the classic ex.. nple of SCI, and normally is derived from intercepted communications. The unauthorized disclosure of such intelligence can reveal to the target country which of its messages are being intercepted and which ones are being read. If the targeted country takes the clearly indicated countermeasures, no further intelligence can be expected from that source and by that method. Similarly, the compromise of other technical collection systems, or intelligence derived from them, call tell our adversaries the capabilities of the systems and how to

take countermeasures. Even worse, once the target country's government knows what the systems collect and how it is collected, it has the option of conducting deception operations, i.e., providing misleading data which may result in defective U.S. foreign and defense policies.

To guard against these risks, SCI security control systems have been evolved in the years since World War II, when the Japanese and German crytographic systems were broken by the Allies, furnishing intelligence which was vital to victory over the Axis Powers. In structuring these systems, the lessons of Pearl Harbor have been borne in mind . . . the systems must permit timely dissemination of sensitive intelligence to those who need it to guide and carry out U.S. defense and foreign policy. Over the years, it has been demonstrated that the recipients' confidence in intelligence reporting has a direct relationship to the recipients' knowledge of the source or method producing it. Because of the amount of intelligence produced by the SCI systems and its broad utility, those with access to SCI number in the thousands.

The authority for SCI control systems is based upon the statutory responsibility of the Director of Central Intelligence (DCI), under the National Security Act of 1947, for the protection of intelligence sources and methods, and upon Executive Order 12356 which authorizes him to create special access programs for especially sensitive intelligence activities.

SCI systems, therefore, cover activities and information of extraordinary sensitivity and fragility from a security standpoint. They serve to restrict access to the protected information to persons who (a) have a clearly established official need for that information, and (b) who meet more rigorous and stringent personnel security criteria. Persons cleared for Confidential, Secret, or even Top Secret information are not automatically eligible by virtue of those clearances for access to SCI.

The personnel security criteria for access to all SCI are established by the DCI and are promulgated in Director of Central Intelligence Directive 1/14. Comparatively, the criteria for TS clearance require that denial be based upon a well-defined character or personality defect posing a threat to the national security. Because of the vulnerabilities and susceptibilities of SCI programs, special judgments must be made. In effect, no risk is tolerable where SCI is involved, and individuals who have been granted Top Secret clearances may be denied approval for access to SCI. Just as clearance for Top Secret does not automatically guarantee SCI access approval, the denial of SCI approval does not necessarily mean denial or revocation of TS clearance. This reflects the difference in the way SCI security is managed, and that it involves a higher order of security that non-SCI security.

SCI security control systems depend upon distinctive markings and restricted handling of material, stricter personnel security processing for access, and holding SCI material in "control centers" with physical and procedural barriers to preclude access by those who have not been formally approved. The SCI control systems provide an organized program for predetermining a generalized need-to-know regarding specific categories of intelligence and/or the sources and methods employed in their collection.

Everyone authorized access to SCI, regardless of that person's function, receives information that, if revealed to an unauthorized person, can compromise the system and reveal ways of countering it. Because the intelligence inherently is source-revealing, the reader of an SCI intelligence report is just as capable of revealing compromising data about a system as the builder or operator of the

system. Material collected by SCI systems which does not reveal the characteristics and vulnerabilities of the source is considered to be sanitized and is disseminated outside compartmented channels.

In accepting sensitive compartmented information, the recipient accepts the accompanying responsibilities and restrictions in a most explicit way. Each individual approved for access is indoctrinated on the extreme vulnerabilities of the collection systems, the risk to the systems of the unauthorized disclosure of the intelligence they collect, and the rules for safeguarding SCI. As a condition of access, the newly approved individual signs an agreement to abide by the security rules for SCI.

To summarize, the rationale for SCI control systems includes the following concepts:

- Sources and methods producing quantities of high quality intelligence, which are extremely vulnerable to countermeasures, require an extraordinary degree of security protection.
- Extraordinary protection can be afforded by restricting knowledge of these sources and methods and, where necessary, the intelligence they produce, to persons who have been subjected to especially thorough security screening, whose knowledge of such information is required for the performance of functions essential to the national security, and who have entered into an agreement requiring that they protect these sources and methods in the manner prescribed by the U.S. Government.
- Because of the extreme vulnerability to countermeasures of the operations covered by SCI control systems, persons granted access to SCI must be determined by thorough investigation to be reliable and trustworthy. The objective of personnel security determinations for SCI access should be a risk-free population of approved individuals.

Therefore, a substantially more vigorous personnel screening process is necessary and a determination standard beyond that for other classified information must be used.

- Especially restricted channels are required for the transmission and use of data revealing the sensitive nature of these sources and methods, and of derived intelligence having the innate capability to compromise such data.
- Regardless of how carefully the security system is structured, the security of our secrets depends, in the final analysis, upon every person granted access. If any one of those entrusted with these secrets has vulnerabilities or susceptibilities which may be exploited, then our security can be breached. Every effort must be expended to avoid such an occurrence.

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 202-037/60063

No. 87-751

RECEIVED
HAND DELIVERED
DEC - 9 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1987

CASPAR WEINBERGER,
SECRETARY OF DEFENSE, ET AL.

Petitioners

v.

JOHN DOE

Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN G. GILL, JR.
GILL & SIPPEL
358 Hungerford Court
Rockville, Maryland 20850
(301) 251-9200

LEONARD P. BIENVENU
51 Monroe Street, Suite 1401
Rockville, Maryland 20850
(301) 424-1011

Attorneys for Respondent

QUESTION PRESENTED

Whether an employee of the National Security Agency dismissed for "indiscriminate personal conduct with unidentified foreign nationals," for constituting a "risk of security exploitation" and "a potential security risk" is entitled to a hearing pursuant to 5 U.S.C. 7532, when 50 U.S.C. 833 is not invoked by the Agency.

TABLE OF CONTENTS

		Page
STATUTES AND REGULATIONS		1
STATEMENT		2
REASONS FOR DENYING CERTIORARI		3
I.	The Decision Below Does not Conflict with Cole v. Young	3
II.	Egan v. Department of Navy Does Not Create A Clear Conflict	7
III.	The Decision of the District of Columbia Circuit Does Not Have the Broad Application and Ramifications Attributed to It by the Government	8
CONCLUSION		11
Appendix:	Presidential Proclamations and Executive Orders	1b
Appendix:	Adverse Personnel Actions for Reasons of National Security	9b

TABLE OF AUTHORITIES

Cases:

Cole v. Young, 351 U.S. 536 (1956)	3
Egan v. Department of Navy, 802 F.2d 1563 (Fed. Cir. 1986), cert. granted, No. 86-1552 (May 26, 1987)	7, 8
Service v. Dulles, 354 U.S. 363 (1957)	4
Vitarelli v. Seaton, 359 U.S. 535 (1959)	4

Statutes and Regulations:

5 U.S.C. 7513	8
5 U.S.C. 7532	passim
50 U.S.C. 832(b)	3
Executive Order 10450, 18 F.R. 2489 (1949-1953 comp.)	1, 4

Miscellaneous:

National Security Agency Personnel Management Manual 30-2 (Aug. 12, 1980) 1, 4

IN THE SUPREME COURT OF THE UNITED STATES

October Term - 1987

No. 87-751

CASPAR WEINBERGER,
SECRETARY OF DEFENSE, ET AL.

Petitioners

v.

JOHN DOE

Respondent

OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent, John Doe, by and through undersigned counsel respectfully opposes the Petition for Writ of Certiorari filed by the Solicitor General of the United States for the reasons listed below.

STATUTES AND REGULATIONS

In addition to the statutes and regulations cited by Petitioner, Executive Order 10450 of April 27, 1953, 18 FR 2489, 3 CFR, 1949-1953 Comp., p. 936, applies and is set out at App. 1b-8b, and Chapter 371 of NSA Personnel Management Manual 30-2 also applies and is set out at App. 9b-15b.

STATEMENT

During the entire administrative process in this case, Respondent was never advised that he was removed "for cause" as is now alleged by the Petitioners, and which allegation appears to be the lynch pin of their argument.[1] Rather, the record clearly reflects that Respondent was

> charged with a willful disregard of Agency Security Regulations concerning association with foreign nationals. Your indiscriminate personal involvement with foreign nationals while on unofficial foreign travel is the type of exploitable personal conduct that may result in your being subjected to undue influence or duress. (Notice of Proposed Action, dated 23 November 1982, to Respondent from Virginia C. Jenkins, Director of Civilian Personnel, NSA (C.A.App. 82-84.))

By decision dated February 9, 1984, the Director of NSA found that Doe's "indiscriminate pattern of activity . . . invites the risk of security exploitation" and that Doe was "significantly flawed in his off-duty behavior and a potential security risk." Accordingly, the Director upheld the charge of "willful disregard of security regulations concerning association with foreign nationals" and approved the NSA Board of Appraisal's finding that Doe's "access to classified information was not clearly consistent with the national security." (C.A.App. 191-193.) The Government's attempt to interpret the record as one of a mere dismissal for cause as opposed to a dismissal on national security grounds is not justified and as the Court of Appeals for the District of Columbia Circuit found in its decision:

> The Agency's own justification for revoking Appellant's security clearance and terminating his employment at NSA was "national security," within the meaning given that term by the Supreme Court. See Cole v. Young, supra. * * *

(Pet. 8a.)

[1] Petitioners, on pages 8-9, suggest that Doe's requests for hearing, pursuant to 5 USC 7532, were denied because he was removed "for cause," citing C.A.App. 220-221. An examination of the record, especially pages cited by Petitioners fails to reveal any termination "for cause."

Simiarly, the District Court never held that Doe was terminated "for cause" as is now alleged (See App. B, pp. 17a-21a).

REASONS FOR DENYING CERTIORARI

I. The Decision Below Does Not Conflict with Cole v. Young.

As the Court of Appeals found, the record below shows that John Doe's security clearance for access to NSA's classified information was revoked and his subsequent termination of employment at NSA were actions taken in the interests of national security.[2] (C.A.App.

[2] Indeed, the fact that a Board of Appraisal, pursuant to 50 USC 832(b) (membership requiring special training and qualifications for security matters) was convened would seem to put the national security nature of this case beyond question.

106-108). This makes mandatory the application of 5 U.S.C. 7532.

Further, in order to satisfy Reponsdent's due process rights, the Department of Defense and NSA must comply with applicable executive orders of the President and its own regulations. Vitarelli v. Seaton, 359 U.S. 535 (1959) and Service v. Dulles, 354 U.S. 363 (1957).

The President's Executive Order 10450, implementing 5 U.S.C. 7532 (App. 1b-8b) and NSA's own regulations, Chapter 370 (pp. 36a-43a of Petition), and Chapter 371 of the NSA Personnel Management Manual (App. 9b-15b) were not adhered to by the Department of Defense and NSA. See Doe Principal Brief below, pp. 22-23 and 26-29. In Executive Order 10450, the application of 5 U.S.C. 7532 is mandated by the second "WHEREAS" paragraph and Sections 5 and 6 thereof. Special attention is called to the following language in Sections 5 and 6: "in accordance with the said act of August 26, 1950."[3]

Further, once an agency head has suspended an employee in the interests of national security under Section (c) of 5 U.S.C. 7532, it seems clear that the employee is then entitled to all of the rights and

[3]5 U.S.C. 7532 was the Act of August 26, 1950. See Pet. p. 13 and U. S. Court of appeals Decision (Pet. 5a).

procedures spelled out in Section (c)(3)(A-E). Doe was denied these.

Petitioners are not correct in stating, on page 14 of their Petition, that in Cole v. Young, 351 U. S. at 543, this Court noted a "summary removal authority granted to agency heads . . . ." Not only does page 543 of Cole v. Young, supra not specifically refer to any "summary removal authority," but the same is also clearly foreclosed by Sections (c)(3)(A)(B)(C)(D), and (E) of 5 U.S.C. 7532. (App. E of Doe principal Brief below.)[4]

The Government's arguments that Cole v. Young, 351 U.S. 536 (1956) is somehow violated by the Court of Appeals' decision is incorrect. That case involved a Veteran's Preference Eligible who was being terminated from his position as a Food and Drug Inspector on the grounds of "association with individuals reliably reported to be Communists." The issue there is whether the National Security Act of 1950 overrode his rights to a hearing appeal, etc. as a Veteran's Preference Eligible. This Court upheld his Veteran's Preference rights, ruling that national security meant "the nation's

[4]Summary suspension is authorized in the discretion of the agency head but "removal" can take place only after notice and hearing of the type ordered here by the Court of Appeals.

safety as opposed to general welfare." This case is easily distinguishable. We are here dealing with the National Security Agency itself, a most sensitive agency of the Department of Defense, and not Food and Drug Inspection.[5] We are dealing with charges of security risks stemming from close associations with alleged foreign nationals. NSA has made its election by charging Respondent and making administrative findings which relate to the nation's safety and not its general welfare. The Agency has repeatedly refused to acknowlege that it has "fired" Respondent because he is a homosexual or because it has made moral pronouncements about his lifestyle. At all times, the Agency was free to do this under its non-security personnel regulations. Instead, it has made a conscious election to terminate him as a national security risk. In these circumstances, the Congressional mandate in 5 U.S.C. 7532 must be honored.

---

[5]The Cole v. Young court gave weight to the specific enumeration of government agencies in the "1950 Act," 5 USC 7532, which included the Department of Defense (351 U.S. at 541, 544, 545). Cole v. Young found it "difficult to justify" 5 USC 7532 application to employees who are not in "sensitive" positions (351 U.S. at 546). Doe was denied access to "sensitive compartmented information," and this is the reason he was fired. His position was "sensitive" under Cole.

II. Egan v. Department of Navy Does Not Create A Clear Conflict.

A reading of the Federal Circuit's Egan Opinion seems to indicate that neither party argued in favor of the application of 5 U.S.C. 7532 as Respondent argued in this case. Rather, Egan at all times sought review based on his status as a veteran in the competitive service. The Government at all times espoused the position that judicial review was unavailable with respect to a denial of a security clearance. While the Federal Circuit does assume that Section 7532 does not constitute an exclusive remedy for one who has rights before the Merit Systems Protection Board under Section 7512, the issue did not have to be decided in the case and is more of an assumption. Accordingly, Egan does not represent a precedent in conflict with the District of Columbia Circuit's decision in this case.[6]

Furthermore, a major distinguishing factor is the existence of the competitive service status of Egan. Respondent, like all NSA employees, is a member of the

---

[6]Indeed, in oral argument in Egan on December 2, 1987, Deputy Solicitor General Cohen told this Court "there has been no challenge to the procedures employed by the Navy in this case."

excepted service and was a non-preference eligible employee, not entitled to a hearing before the Merit Systems Protection Board or the other rights held by competitive service employees. The mere fact that Respondent could have no judicial review had 7532 been utilized and that Egan was entitled to judicial review by virtue of his Veteran's Preference Eligible/Competitive Service Status does not create an irreconcilable conflict.

The Federal Circuit takes pains to contrast "employees subject to Section 7532 (national security)" and notes, in footnote 2, that NSA employees "can be exempt from the procedural rights granted under 5 USC 7513 . . ." (802 F.2d 1563,1567 (Fed. Cir. 1986)). This implies that a different result concerning Section 7532 might have been reached by the Egan court for a non-preference eligible NSA employee.

III. **The Decision of the District of Columbia Circuit Does Not Have the Broad Application and Ramifications Attributed to It by the Government.**

The Government argues (Pet. 10) that the decision at issue "is important to all Federal agencies concerned with national security" and goes on to argue that the ramifications of the decision benefit neither the agency, nor Respondent, nor employees in general.

As far as Respondent is concerned, one simple answer is that a hearing at Department of Defense level, as mandated by Section 7532, constitutes an independent review of action alleged to be arbitrary, capricious, and unreasonable on the part of the Agency.

Furthermore, with respect to Respondent and all employees at NSA or any other Agency in the excepted service (with the exception of veteran's preference eligibles), there is no statutory right of hearing or review by the Agency head (in this case the Secretary of Defense), except for 5 U.S.C. 7532. All said employees are thus protected by such review, and the Secretary of Defense or comparable agency head may bring to bear a certain amount of "agency expertise" in making a determination in a situation which may be considered "delicate" or one that requires agency expertise.[7]

At the District Court and Court of Appeals levels, the Government argued that the protections contained in statutes and regulations could not apply to the revocation of a security clearance. This circuitous

---

[7]The petition repeatedly assumes that Section 7532 requires a summary suspension without pay, etc. Such is not the case. The suspension is discretionary. Only when removal is sought on security grounds is a hearing necessary.

argument essentially said that, even if an employee has procedural protections with respect to his removal or termination of employment, such do not apply because NSA merely revoked Doe's security clearance. It went on, however, to argue that the employee could not continue employment without a security clearance. The decision of the Court of Appeals forbids such circular reasoning. Now the Government must make an election as to whether or not to terminate the employee for "cause" under its regular personnel procedures, or for "security reasons" invoking the procedures (and protections) of Section 7532. Rather than putting an increased burden on the Government, the decision only compels the Government to be honest in its termination proceedings.

This case is an example of potential government abuse. Respondent received good or excellent ratings for his sixteen years of employment. It was only during a drug investigation with respect to which Respondent was found not to be involved that he revealed his homosexuality during a polygraph examination. Rather than face up to the issue that NSA wanted to terminate Doe because of his sexual preference, it denominated him a security risk.

As the Court of Appeals' decision (Petition, 10a) cogently notes, the Government's argument that the power

to hire implicitly confers the power to fire, cannot serve to override pre-existing statutory procedural rights. Indeed, the logical extension of such an argument would create an intolerable situation. Every time Congress creates a new agency or governmental entity, it does not intend to do away with all existing statutory termination procedures.

CONCLUSION

Respondent respectfully submits that the Government's Petition for Writ of Certiorari should be denied.

JOHN G. GILL, JR.
Gill & Sippel
358 Hungerford Court
Rockville, Maryland 20850
251-9200

LEONARD P. BIENVENU
51 Monroe Street, #1401
Rockville, Maryland 20850
424-1011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served a copy of the foregoing Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, have been served, to wit: The Honorable Frank Carlucci, Secretary of Defense, Successor to Caspar Weinberger, and Lt. General William E. Odom, Director of the National Security Agency, by mailing, postage prepaid, a copy of the same to Michael K. Kellogg, Assistant to the Solicitor General, United States Department of Justice, Washington, D. C. 20530, this 8th day of December 1987.

JOHN G. GILL, JR.

United States. President.
"
LIBRARY OF CONGRESS
DEC - 5 1985
COPY
EXCHANGE & GIFT DIVISION

Codification of

Presidential Proclamations and Executive Orders,

January 20, 1961 — January 20, 1985

Office of the Federal Register
National Archives and Records Administration

Executive Order 10450—Security requirements for Government employment

SOURCE: The provisions of Executive Order 10450 of Apr. 27, 1953, appear at 18 FR 2489, 3 CFR, 1949–1953 Comp., p. 936, unless otherwise noted.

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.[1]

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Office of Personnel Management may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

[1] EDITORIAL NOTE: In *Cole* v. *Young*, 76 S.Ct. 861 (1955), section 1 of EO 10450 was held to be invalid if applied to every department and agency.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field pre-appointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

[Sec. 3 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency,

unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Office of Personnel Management that such person is eligible for such employment.

[Sec. 7 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in, any foreign or domestic organization, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to pre-

vent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Office of Personnel Management, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Office. The Office shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Office of Personnel Management, and other departments and agencies may use such facilities under agreement with the Office.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

[Sec. 8 amended by EO 10491 of Oct. 13, 1953, 18 FR 6583, 3 CFR, 1949–1953 Comp., p. 973; EO 10531 of May 27, 1954, 19 FR 3069, 3 CFR, 1954–1958 Comp., p. 193; EO 10548 of Aug. 2, 1954, 19 FR 4871, 3 CFR, 1954–1958 Comp., p. 200; EO 11785 of June 4, 1974, 39 FR 20053, 3 CFR, 1971–1975 Comp., p. 874; EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 9. (a) There shall be established and maintained in the Office of Personnel Management a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Office under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Office of Personnel Management information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

[Sec. 9 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Office of Personnel Management on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Office of Personnel Management on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

[Sec. 11 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked.

[Sec. 12 amended by EO 11785 of June 4, 1974, 39 FR 20053, 3 CFR, 1971–1975 Comp., p. 874]

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable

Codification of Presidential Proclamations and Executive Orders

them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Office of Personnel Management, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Office of Personnel Management shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Office of Personnel Management to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Office of Personnel Management in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the Office as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Office of Personnel Management is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

[Sec. 14 amended by EO 10550 of Aug. 5, 1954, 19 FR 4981, 3 CFR, 1954–1958 Comp., p. 200; EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 15. This order shall become effective thirty days after the date hereof.

EXHIBIT "A"

CHAPTER 371

ADVERSE PERSONNEL ACTIONS FOR REASONS OF NATIONAL SECURITY

This chapter prescribes policies and procedures governing actions to limit access to classified information, suspend and/or terminate civilian personnel of the National Security Agency for reasons of national security. "Basic '76" pages are reprinted from the First Edition of the PMM issued in 1968. Organizational designators and references have been updated.

CONTENTS

Section		Paragraph	Page
1	GENERAL		
	Scope	1-1	1
	Authority	1-2	1
	Policy	1-3	1
	Definitions	1-4	2
	Boards of Appraisal	1-5	2
2	SUSPENSION AND TERMINATION OF EMPLOYMENT		
	Suspension Under 5 United States Code 7532	2-1	3
	Termination Under 5 United States Code 7532	2-2	3
	Termination Under 50 United States Code 831–835	2-3	3
3	ADMINISTRATION		
	General	3-1	5
	Resignation	3-2	5
	Corrective Actions	3-3	5

SECTION 1

GENERAL

1-1. Scope.—This chapter prescribes policies and procedures governing actions to limit access to classified information, suspend and/or terminate civilian personnel of the National Security Agency/Central Security Service for reasons of national security. Such actions for reasons other than national security are processed in accordance with NSAPMM Chapter 370.

1-2. Authority.—The regulations contained in this chapter are in accordance with, and pursuant to, the authority and requirements contained in the following:

a. The Internal Security Act, approved 26 August 1950 (Public Law 733, 81st Congress), 5 U.S. Code 7532, as amended.

b. Executive Order 10450, "Security Requirements for Government Employment", April 27, 1953, as amended.

c. Public Law 88-290, 26 March 1964, which amends the Internal Security Act by the addition of Title II, entitled "Personnel Security Procedures in National Security Agency".

d. Public Law 89-380, 30 March 1966, "The Back Pay Act of 1966", which amends Public Law 733 and provides certain payments and the restoration of employment benefits to employees improperly deprived thereof.

e. DoD Directive 5210.8 "Policy on Investigations and Clearance of DoD Personnel for Access to Classified Defense Information".

f. PMM Chapter 808, Personnel Security Program for employment clearance and access.

1-3. Policy.

a. *Employment and Access.*—No person shall be employed in, or detailed or assigned to, the National Security Agency, or continue to be so employed, detailed, or assigned; and no person may be employed, detailed, or assigned shall have access to any classified information; unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security. The clearance standards and requirements of PMM Chapter 808, and the employment standards of Executive Order 10450 shall be the basis for such determination.

b. *Use of Suspension and Removal Authorities.*

(1) The use of the suspension and removal procedures authorized by 5 U.S.C. 7532 shall be limited to cases involving the interests of the national security.

(2) The termination procedures prescribed in 50 U.S.C. 833 will be invoked only when the termination of employment cannot, because of paramount national security interests, be effected under any other provision of law.

(3) Maximum use will be made of Boards of Appraisal, established by NSA Regulation No. 30-4 pursuant to 50 U.S.C. 832 and DoD Directive 5210.45 to assist the Director, in discharging his personnel security responsibilities.

(4) Nothing contained herein limits or affects the responsibility and authority of the Director, or his designee, to reassign or detail persons to positions where access to classified information is limited or denied pending final determination of employability or eligibility for access to classified information.

1-4. Definitions.

a. *National Security.*—As used herein, the term "national security" refers to those activities which are directly related to the protection of the military, economic, and productive strength of the United States including the protection of the government in domestic and foreign affairs, against espionage, sabotage, subversion, and any other illegal acts which adversely affect the national defense.

b. *Classified Information.*—For purposes of this regulation, the term "classified information" means official information which has been determined to require, in the interests of national security, protection against unauthorized disclosure and which has been so designated.

1-5. Boards of Appraisal.—The Director shall refer to a duly constituted Board those cases in which he determines that there is a doubt as to an employee's eligibility for access to classified information. Authority to refer such cases has been delegated to the Assistant Director for Personnel and Security. The Board shall proceed in accordance with the provisions of NSA Regulation No. 30-4.

SECTION 2

SUSPENSION AND TERMINATION OF EMPLOYMENT

2-1. Suspension Under 5 United States Code 7532.

a. 5 U.S.C. 7532 authorizes the Secretary of Defense to summarily suspend, without pay, an civilian employee when such action is deemed necessary in the interests of national security This authority to suspend has been delegated to the Director by DoD Directive 5100.23. Prior to preparation of a letter of charges covering a proposed suspension action, the Director shall consult with the General Counsel of the Department of Defense.

b. An employee who has been suspended under 5 U.S.C. 7532 and whose termination under that Act is proposed, will be granted procedural benefits in accordance with the provisions of the Act, as follows:

(1) All suspensions will be for an indefinite period, that is, "until further notice".

(2) The 30-day time limit specified in 5 U.S.C. 7532 will be construed to mean calendar days.

(3) To the extent that the Director determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension. If it is determined that a statement can be given the employee, the statement shall include all information except that which will reveal classified security information or material, investigative methods, or the identity of confidential informants.

(4) Within 30 days after the notification, the suspended employee is entitled to submit to the Director statements or affidavits to show why he should be restored to duty.

2-2. Termination Under 5 United States Code 7532.

a. An employee may be terminated under 5 U.S.C. 7532 only by the Secretary of Defense.

b. After his suspension and before termination a permanent employee (excepted appointment without time limitation) who is a U.S. citizen, is entitled to:

(1) A written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(2) An opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(3) A hearing, at the request of the employee;

(4) A review of his case by the Secretary of Defense or his designee, before a decision adverse to the employee is made final; and

(5) A written statement of the decision of the Secretary of Defense.

c. Prior to preparation of a letter of charges proposing termination of an employee pursuant to 5 U.S.C. 7532, the Director shall consult with the General Counsel of the Department of Defense.

d. The decision of the Secretary of Defense is final.

2-3. Termination Under 50 United States Code 831-835.

a. 50 U.S.C. 831-835 authorizes the Secretary of Defense to terminate the employment of any officer or employee of the NSA/CSS whenever:

(1) He considers that action to be in the interest of the United States; and

(2) He determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security.

b. Termination of employment under the provisions of this law shall be recommended to the Secretary of Defense only when the above two conditions exist.

c. Determination by the Secretary of Defense to terminate under this authority is final.

SECTION 3
ADMINISTRATION

3-1. General.

a. When investigation of information discloses reasons to doubt an employee's eligibility for access to classified information, the Chief of Security will refer the case to the Assistant Director for Personnel and Security with the recommendation that there be a limitation of access pending determination of the case. This may be effected by detail or reassignment to a position not requiring such access unless immediate suspension is deemed necessary.

b. Representatives of the Civilian Personnel [redacted] will conduct any discussions with an employee concerning his access limitation, detail, reassignment, suspension or separation. Representatives of the Office of Security [redacted] may discuss the case with the employee when additional information is required in the investigation of the case.

c. A Letter of charges will be prepared and coordinated by Civilian Personnel, and official personnel actions effecting details, reassignments, suspensions and/or separations will be processed in accordance with PMM Chapter 301.

3-2. Resignation.—If an employee resigns during the investigation or processing of a security case the resignation will be accepted and processed in accordance with PMM Chapters 370 and 301. In addition, the following will apply:

a. If the employee resigns *after* he has received oral or written notice that an adverse action is proposed or has been decided upon under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, his resignation (Form 3150) will be documented to show in "Remarks" the reasons for resignation as stated by the employee and, in addition, as applicable:

(1) Resigned after being orally informed on (date) that action is being initiated to separate (or suspend) him under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, as appropriate, and consistent with E.O. 10450.

(2) Resigned after receiving written notice proposing to separate (or suspend) him under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, as appropriate, and consistent with E.O. 10450.

(3) Resigned after receiving written notice of a decision to separate (or suspend) him under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, as appropriate and consistent with E.O. 10450. An employee who tenders his resignation under these circumstances *must be advised* that documentation of his resignation will include the unfavorable information shown.

b. If the employee resigns *before* he receives oral or written notice that an adverse action is proposed or has been decided upon, the Form 3150 will contain only routine data, with no reference to the unfavorable information.

c. If the employee resigns or is separated before an investigation has been completed, the Chief of Civilian Personnel will notify the Chief of Security immediately.

3-3. Corrective Actions.—Unwarranted or unjustified suspension or separation under the provisions of this Chapter will be corrected as follows:

a. Retroactive restoration after separation is effected by cancelling the separation, citing the same authority which was used to effect the separation. In addition to the required information cited in PMM Chapter 301, add the remark: "Retroactive restoration by corrective action of the Secretary of Defense". Show entitlement to back pay in accordance with PMM Chapter 351.

b. Unwarranted suspension under 5 U.S.C. 7532 is also corrected by cancellation, citing the same authority. In addition to the information cited in PMM Chapter 301, add the remark: "Retroactive restoration by corrective action by _____" (show "Director, NSA" or "Secretary of Defense" as appropriate). Show date active duty started. Show entitlement to back pay in accordance with PMM Chapter 351.

BEST COPY AVAILABLE

Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-751

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRANK CARLUCCI, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-751

FRANK CARLUCCI, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The court of appeals held that an NSA employee may be removed for reasons relating to national security only by the Secretary of Defense, acting in person under either 5 U.S.C. 7532 or 50 U.S.C. 833(a), and that the Director of NSA thus has no authority to remove an employee "for cause" where the cause is related to national security. We argued in our Petition (at 10-19) that the court of appeals has wrongly decided a question of considerable importance and that its decision directly conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, 802 F.2d 1563 (1986), cert. granted, No. 86-1552 (argued Dec. 2, 1987). Respondent's arguments on the merits of the question presented (Br. in Opp. 3-6) were fully dealt with in our petition (at 10-17). Respondent, however, makes three additional arguments designed to show that this case is not certworthy.

1. Respondent contends (Br. in Opp. 2-3 & n.1) that NSA never invoked its "for cause" removal procedures in this case. That is incorrect. Respondent received a "notice of proposed action to remove you * * * in accordance with

the provisions of NSA/CSS Personnel Management Manual (PMM) 30-2, Chapter 370" (C.A. App. 82). Chapter 370 sets forth in Section 3 (Pet. App. 38a) the standards and procedures for removing an employee and specifically provides that an employee may be removed pursuant to that section only for "such cause as will promote the efficiency of the service." NSA expressly relied upon that removal authority (and no other) and fully complied with its procedures governing "for cause" removals (see Pet. 7-9).[1]

The "cause" for respondent's removal was, of course, related to national security: clearance for access to sensitive compartmented information (SCI) is a continuing statutory requirement for employment at NSA (see Pet. 11-12), and the determination that respondent's access to SCI was no longer "clearly consistent with the national security" (50 U.S.C. 831) therefore required respondent's removal. But respondent's assumption that NSA cannot have properly invoked its "for cause" removal procedures, because the cause for removal involved national security, merely repeats the error made by the court of appeals.

2. Contrary to respondent's assertion (Br. in Opp. 8-10), the impact of the decision below is by no means limited to NSA. Section 7532 has no special application to NSA; it also applies to other parts of the Department of Defense and a number of other departments and agencies (see Pet. 6 n.5). Employees subject to removal under Section 7532 include employees in the competitive service who may be removed "for such cause as will promote the efficiency of the service" under 5 U.S.C. 7512-7513. Neither the court of appeals nor respondent has suggested any reason why, if Section 7532 displaces the "for cause"

[1] When respondent's counsel requested a pre-removal hearing (C.A. App. 218-219) pursuant to 5 U.S.C. 7532, NSA replied that the removal was not pursuant to Section 7532, but rather "in accordance with NSAPMM Chapter 370" (C.A. App. 220). Thus, NSA again made clear its intent to rely upon its "for cause" regulations in removing respondent.

removal authority of NSA where the "cause" involves national security, it would not similarly displace the "for cause" provisions applicable to competitive service employees.[2]

3. The decision below directly conflicts with the decision of the Federal Circuit in *Egan* v. *Department of the Navy*, which explicitly held that a competitive service employee who is denied a security clearance required by his job may be removed for cause under 5 U.S.C. 7512-7513 without invocation of 5 U.S.C. 7532 (802 F.2d at 1567-1569). Respondent's assertion (Br. in Opp. 7) that the Federal Circuit merely "assum[ed]" without deciding that a "for cause" removal was appropriate is incorrect. Although none of the parties or amici in *Egan* took a contrary position, the issue was nonetheless decided by the court of appeals as an essential predicate to the court's decision of the issue actually in dispute. Indeed, the court of appeals devoted an entire section of its opinion to the question.[3]

For the foregoing reasons, and the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted either now or after the Court's decision in *Department of the Navy* v. *Egan*, No. 86-1552.

CHARLES FRIED
Solicitor General

DECEMBER 1987

[2] The court of appeals did stress (Pet. App. 9a) that Section 7532 predates the National Security Agency Act of 1959, but, whatever the relevance of that point (see Pet. 18 n.12), Section 7532 also predates the Civil Service Reform Act of 1978.

[3] The question was also decided by the MSPB in a separate section of its opinion. 28 M.S.P.B. 509, 520-521 (1985). In fact, the MSPB specifically solicited amicus briefs from interested parties on that issue. See 50 Fed. Reg. 2355 (1985); 49 Fed. Reg. 48623 (1984).

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60206

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-751

In the Supreme Court of the United States

OCTOBER TERM, 1987

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
MICHAEL K. KELLOGG
Assistant to the Solicitor General
BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether an employee of the National Security Agency who fails to maintain a required clearance for access to classified information may be removed "for cause," without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
A. The statutory and regulatory framework	2
B. Proceedings below	6
Summary of argument	10
Argument:	
The Director of NSA may, without invoking the summary dismissal procedures of 5 U.S.C. 7532 or 50 U.S.C. 833, remove "for cause" an employee who fails to maintain a required clearance for access to classified information	14
A. The Director of NSA is empowered to remove employees for cause, including lack of a required security clearance	15
B. The authority of the Director of NSA to remove employees for cause is not limited by 50 U.S.C. 833	24
C. The authority of the Director of NSA to remove employees for cause is not limited by 5 U.S.C. 7532	26
Conclusion	41

TABLE OF AUTHORITIES

Cases:

Almazan v. *Department of Air Force*, 26 M.S.P.R. 318 (1985)	19
Arnett v. *Kennedy*, 416 U.S. 134 (1974)	16
Buriani v. *Department of Air Force*, 777 F.2d 674 (Fed. Cir. 1985)	19
Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961)	16
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985)	18
Cole v. *Young*, 351 U.S. 536 (1956)	*passim*
Crenshaw v. *United States*, 134 U.S. 99 (1890)	16
De Castro v. *Board of Comm'rs*, 332 U.S. 451 (1944)	16

Cases – Continued: Page

Egan v. *Department of Navy*, 28 M.S.P.R. 509 (1985), rev'd, 802 F.2d 1563 (Fed. Cir. 1986), rev'd, No. 86-1552 (Feb. 23, 1988) 13, 18, 21-22, 34, 35, 37, 38, 39
Hennen, Ex parte, 38 U.S. (13 Pet.) 230 (1839) 16
Hoska v. *Department of Army*, 677 F.2d 131 (D.C. Cir. 1982) 22
Jackson v. *United States Postal Service*, 666 F.2d 258 (5th Cir. 1982) 19
Keim v. *United States*, 177 U.S. 290 (1900) 16
Molerio v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) 22
Shurtleff v. *United States*, 189 U.S. 311 (1903) 16
Stalans v. *National Security Agency*, 678 F.2d 482 (4th Cir. 1982) 22
Tennessee v. *Dunlap*, 426 U.S. 312 (1976) 19
United States v. *Fausto*, No. 86-595 (Jan. 25, 1988) ... 14, 17, 36
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 17
Womer v. *Hampton*, 496 F.2d 99 (5th Cir. 1974) 19
Zimmerman v. *Department of Army*, 755 F.2d 156 (Fed. Cir. 1985) 19

Statutes, regulations and rules:

Act of June 28, 1940, ch. 440, § 6, 54 Stat. 679 31
Act of Dec. 17, 1942, ch. 739, § 3, 56 Stat. 1053 31
Act of Aug. 26, 1950, ch. 803, 64 Stat. 476 13
§ 1, 64 Stat. 476-477 27
§ 2, 64 Stat. 477 32
Act of Mar. 26, 1964, Tit. III:
Pub. L. No. 88-290, § 306(a), 78 Stat. 170 ..... 16, 17
50 U.S.C. 831 *et seq.* 2
50 U.S.C. 831 ..... 3, 9, 19, 20, 23, 39, 40
50 U.S.C. 832 ..... 9, 19
50 U.S.C. 832(a) 3, 4, 14, 19, 21, 24, 25
50 U.S.C. 832(b) 3, 4, 7, 20, 21, 23, 25
50 U.S.C. 833 ..... 8, 9, 10, 24, 25, 26

Statutes, regulations and rules – Continued: Page

50 U.S.C. 833(a) 6, 9, 11, 12, 14, 15, 26, 27
Atomic Energy Act of 1946, ch. 724, § 12(a)(4), 60 Stat. 771 ..... 31, 32
Civil Service Reform Act of 1978:
Ch. 23, 5 U.S.C. 2301 *et seq.*:
5 U.S.C. 2302(a)(2)(C)(ii) 17
Ch. 43, 5 U.S.C. 4301 *et seq.*:
5 U.S.C. 4301(1)(C)(ii) 17
Ch. 73, 5 U.S.C. 7301 *et seq.*:
5 U.S.C. 7312 ..... 1, 5, 28
Ch. 75, 5 U.S.C. 7501 *et seq.*:
5 U.S.C. 7501(1) 18
5 U.S.C. 7511-7513 ..... 1, 3, 10
5 U.S.C. 7511(a) 3, 17
5 U.S.C. 7511(a)(1)(B) 3, 18
5 U.S.C. 7511(a)(2) 14
5 U.S.C. 7512 25
5 U.S.C. 7512-7513 39
5 U.S.C. 7513 ..... 3, 14, 35
5 U.S.C. 7513(a) 17
5 U.S.C. 7531 ..... 5, 31
5 U.S.C. 7532 ..... *passim*
5 U.S.C. 7532(a) 5, 12, 30
5 U.S.C. 7532(b) 5, 27
5 U.S.C. 7532(c)(3)(A) 34
5 U.S.C. 7532(c)(3)(C) 5, 34
5 U.S.C. 7533 32
Department of State Appropriation Act, 1947, 541, 60 Stat. 458 31
Department of State Appropriation Act, 1948, ch. 211, 61 Stat. 279 31
Department of State Appropriation Act, 1949, ch. 400, § 104, 62 Stat. 315 31
Department of State Appropriation Act, 1950, ch. 354, § 104, 63 Stat. 456 31
Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 555, 5 U.S.C. (1964 ed.) 652 16

Statutes, regulations and rules – Continued: Page

National Military Establishment Appropriation Act, 1950, ch. 787, § 630, 63 Stat. 1023 31
National Security Agency Act of 1959, 50 U.S.C. 402 note 1-2, 8
§ 2 ..... 2, 15
Veteran's Preference Act of 1944, ch. 287, § 14, 58 Stat. 390, 5 U.S.C. (1946 ed.) 863 ..... 16, 21
Exec. Order No. 10,450, § 1, 3 C.F.R. 936 (1949-1953 comp.) 5
Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.) 16
NSA Reg. No. 30-4 (June 22, 1964) 20
Civil Service Rules § 1.4(a), *reprinted in* 5 U.S.C. 3301 note 17

Miscellaneous:

96 Cong. Rec. 10028 (1950) 30
Director of Central Intelligence Directive No. 1/14 (Sept. 1, 1983) 20, 23, 37
DoD Directive:
No. 5100.23 (May 17, 1967) 2, 15
No. 5210.45 (May 9, 1964) 2, 20, 25
49 Fed. Reg. 48623 (1984) 38
50 Fed. Reg. 2355 (1985) 38
H.R. Rep. 2264, 80th Cong., 2d Sess. (1948) 30, 31
H.R. Rep. 2330, 81st Cong., 2d Sess. (1950) 27, 30, 31
H.R. Rep. 108, 85th Cong., 1st Sess. (1963) 17
National Security Agency Personnel Management Manual (Aug. 12, 1980) 2, 3, 18, 23
Report of the Comm'n on Government Security, S. Doc. 64, 85th Cong., 1st Sess. (1957) 5
Security Comm. of the Central Intelligence Agency, *Sensitive Compartmented Information: Characteristics and Security Requirements* (June 1984) 4
S. Rep. 1155, 80th Cong., 2d Sess. (1948) 30
S. Rep. 2158, 81st Cong., 2d Sess. (1950) 27, 30, 31

Miscellaneous – Continued: Page

Hearing on S. 1561 and S. 1570 Before a Subcomm. of the Senate Comm. on Armed Services, 80th Cong., 2d Sess. (1948) 29, 32

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-751

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL.,
PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 820 F.2d 1275. The opinion of the district court (Pet. App. 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on June 9, 1987. A petition for rehearing was denied on August 18, 1987 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on November 4, 1987, and was granted on February 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions, 5 U.S.C. 7312, 7511-7513 and 7532, and relevant portions of the National

Security Agency Act of 1959, 50 U.S.C. 402 note, the Act of Mar. 26, 1964, Tit. III, 50 U.S.C. 831 *et seq.*, and Chapter 370 of the *National Security Agency Personnel Management Manual* 30-2 (Aug. 12, 1980) are set forth in Pet. App. 26a-43a.

STATEMENT

A. The Statutory And Regulatory Framework

1. The National Security Agency was established by Presidential Directive in 1952 as a separately organized intelligence agency within the Department of Defense. The National Security Agency Act of 1959, 50 U.S.C. 402 note (the 1959 NSA Act), gave the Secretary of Defense, or his designee, the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency" (§ 2, 50 U.S.C. 402 note). In DoD Directive No. 5100.23 (May 17, 1967) (C.A. App. 56-58),[1] the Secretary of Defense delegated his authority under the 1959 NSA Act to the Director of NSA. The Director has, in turn, promulgated regulations governing personnel matters. *National Security Agency Personnel Management Manual* (NSA/PMM) 30-2 (Aug. 12, 1980). Chapter 370 of these regulations (Pet. App. 36a-43a) sets forth the general standards and procedures for removing an employee.

By virtue of the 1959 NSA Act, NSA employees are in the "excepted service" rather than the "competitive service." This means that unless they are preference-eligible veterans they are not covered by Subchapter II of Chapter 75 of the Civil Service Reform Act of 1978

[1] "C.A. App." refers to the Joint Appendix filed in the court of appeals, copies of which have been lodged with the Clerk.

(CSRA), 5 U.S.C. 7511-7513. Chapter 370 of the NSA regulations provides, however, that an NSA employee may be removed for "such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4), a standard for removal identical to that for competitive-service employees covered by Subchapter II. NSA employees also enjoy by regulation many of the same procedural protections afforded to the competitive service by Subchapter II of the CSRA, including the right to advance written notice of an adverse action, a statement of reasons for the action, an opportunity to respond and be represented by counsel, and a written decision (compare NSA/PMM §§ 370.3-5 to 370.3-7 with 5 U.S.C. 7513). Preference-eligible veterans employed at NSA, like other preference-eligible federal employees (see 5 U.S.C. 7511(a)(1)(B)), have the right to appeal an adverse action to the Merit Systems Protection Board (MSPB) (NSA/PMM § 370.3-8a(1)). Nonveterans at NSA, however, may not appeal adverse actions to the MSPB (§ 370.3-8a(2)), just as other nonveterans in the excepted service have no right of MSPB appeal under the CSRA (see 5 U.S.C. 7511(a)).

2. NSA is responsible for conducting intelligence activities of the United States Government relating to communications and computer security. Because of the sensitive nature of the tasks performed by NSA, the Secretary of Defense is statutorily directed to ensure that no person is employed by the Agency, or granted access to classified information, unless such employment or such access is "clearly consistent with the national security" (50 U.S.C. 831). In particular, subject to specified exceptions, no person may be employed "unless he has been the subject of a full field investigation" (50 U.S.C. 832(a)). Subsection (b) of the same section provides for boards of appraisal to assist the Secretary and the Director of NSA in making ac-

cess determinations and further provides that "[n]o person shall be cleared for access to classified information, contrary to the recommendations of any such board, unless the Secretary (or his designee for such purpose) shall make a determination in writing that such employment * * * is in the national interest" (50 U.S.C. 832(b)).

All employees at NSA are required to be cleared for access to Sensitive Compartmented Information (SCI), which includes "data about sophisticated technical systems for collecting intelligence and information collected about those systems." Security Comm. of the Central Intelligence Agency, *Sensitive Compartmented Information: Characteristics and Security Requirements* (June 1984), *reprinted in* Pet. App. 44a-51a (SCI Characteristics).[2] The standards and criteria for access to SCI are "more rigorous and stringent" than those for a top secret clearance, and individuals who have been granted top secret clearances may nonetheless be denied access to SCI (*id.* at 48a).[3]

3. Heads of various agencies, including the Department of Defense, have the power to suspend and thereafter to remove any employee when they determine that such action is necessary or advisable in the interests of national security. Section 7532 of Title 5, United States Code, provides that "the head of an agency" may summarily suspend an employee without pay when he considers such action "necessary in the interests of national

[2] Clearance for "access to sensitive cryptologic information or material" is a statutory requirement of employment at NSA, except that conditional employment without such access may be granted pending completion of a full field investigation. See 50 U.S.C. 832(a).

[3] "Because of the extreme vulnerability to countermeasures of the operations covered by SCI control systems, * * * a substantially more vigorous personnel screening process is necessary and a determination standard beyond that for other classified information must be used" (SCI Characteristics, Pet. App. 50a-51a).

security" and may remove a suspended employee when, after following specified procedures, he determines that removal is "necessary or advisable in the interests of national security." 5 U.S.C. 7532(a) and (b).[4] With certain exceptions, an employee suspended under this section is entitled to notice of the reasons for the suspension and an opportunity to respond, a hearing "by an agency authority duly constituted for the purpose" (5 U.S.C. 7532(c)(3)(C)), and a written decision. Neither a suspension nor a removal under Section 7532 is subject to outside review. *Cole* v. *Young*, 351 U.S. 536, 546 (1956). An employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government except after consultation with the Office of Personnel Management (OPM) (5 U.S.C. 7312).

Congress also gave the Secretary of Defense broad and unreviewable discretion to remove any NSA employee when he considers such action to be in the interest of the

[4] 5 U.S.C. 7531 contains a list of specific agencies and departments to which Section 7532 applies, but also provides that Section 7532 will apply to any "such other agency * * * as the President designates in the best interests of national security." By Executive Order, the President has extended Section 7532 "to all other departments and agencies of the Government." Exec. Order No. 10,450, § 1, 3 C.F.R. 936 (1949-1953 comp.). In *Cole* v. *Young*, 351 U.S. 536, 551 (1956), however, this Court held that "a condition precedent to the exercise of th[is] dismissal authority is a determination by the agency head that the position occupied is one affected with the 'national security' "—a determination, the Court made clear (*id.* at 548 (footnote omitted)), that will only be possible in agencies with "a close and immediate concern with the defense of the Nation." Following *Cole*, the Attorney General instructed federal agencies to limit removal proceedings under Executive Order No. 10,450 to employees who hold sensitive positions. *Report of the Comm'n on Government Security*, S. Doc. 64, 85th Cong., 1st Sess. 35 (1957).

United States and determines that compliance with the removal procedures set forth in other provisions of law would not be consistent with national security. 50 U.S.C. 833(a) provides:

> Notwithstanding Sections 7512 and 7532 of title 5, or any other provision of law, the Secretary may terminate the employment of any officer or employee of the Agency whenever he considers that action to be in the interest of the United States, and he determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security. Such a determination is final.

B. Proceedings Below

1. Respondent, a nonveteran, was employed at NSA from 1968 to 1984 as a cryptographic material control technician (Pet. App. 2a). In 1982 he disclosed to NSA security officials that he had engaged in homosexual relations with unnamed individuals, including foreign nationals (*ibid.*). Respondent was subsequently notified pursuant to NSA regulations of his proposed removal from employment on the ground that his continued access to SCI was not clearly consistent with the interests of national security (C.A. App. 83). The notice advised respondent that he had a right to respond, to be represented by counsel, and to review the information upon which the Agency relied in reaching its decision (*id.* at 83-84). The notice also advised respondent that he would be retained in pay status during the adjudication process but that he would not be permitted access to SCI (*id.* at 84).

Through counsel, respondent answered and offered to undergo a psychiatric evaluation to demonstrate that he

did not pose a security risk (Pet. App. 2a). The Agency agreed to the psychiatric evaluation (*id.* at 3a) and, in the meantime, convened a board of appraisal pursuant to 50 U.S.C. 832(b) to determine whether respondent's continued access to SCI was clearly consistent with the national security (Pet. App. 3a). Based on a detailed report of the psychiatrist in response to questions from the board (C.A. App. 101, 110-113), the board ultimately concluded that respondent's continued access to SCI was not clearly consistent with the interests of national security (Pet. App. 3a). The board recommended, however, that in view of respondent's satisfactory job performance the Agency assist him in finding employment outside NSA (*id.* at 3a-4a).

Respondent's counsel filed a lengthy brief (C.A. App. 121-144) together with summaries of interviews and letters of respondent's acquaintances attesting generally to his good character and trustworthiness (*id.* at 147-174, 183-190). Respondent and his counsel also had a hearing before the Director of NSA at which respondent challenged the decision to withdraw his access to SCI (*id.* at 191). Following consideration of all of respondent's submissions, the Director determined to revoke respondent's eligibility for access to SCI and explained his reasons for doing so in a written decision (*id.* at 191-192). The Director noted the history of respondent's sexual relations with foreign nationals and concluded (*id.* at 192) that "it is the indiscriminate pattern of [respondent's] activity which invites the risk of security exploitation rather than the specific homosexuality of it." Since SCI clearance was a condition of respondent's job and all other jobs at NSA, the Director, relying on the authority delegated to him under the 1959 NSA Act, ordered that respondent be removed (Pet. App. 4a).

Respondent's counsel requested a pre-removal hearing pursuant to 5 U.S.C. 7532 (Pet. App. 4a). This request was directed to the Secretary of Defense as well as to the Director of NSA (C.A. App. 216-219). Both NSA and the Department of Defense replied that respondent's removal was "for cause" pursuant to NSA regulations and was not pursuant to the Secretary's summary authority under either 50 U.S.C. 833 or 5 U.S.C. 7532 (C.A. App. 220, 221). Respondent renewed his request for a Section 7532 hearing, and also contended that the appointment authority provided in the 1959 NSA Act, 50 U.S.C. 402 note, and delegated to the Director of NSA, did not include any authority to remove employees (C.A. App. 222, 223). The renewed request was denied (*id.* at 224, 225), and respondent's employment was terminated effective March 9, 1984 (*id.* at 226).

2. Respondent then filed suit in the district court contending that his removal violated various constitutional and statutory rights. He argued, inter alia, that the Director had no statutory authority to remove him under the 1959 NSA Act and that, unless the Secretary proceeded under NSA's special summary authority (50 U.S.C. 833), the only available statutory authority for his removal was 5 U.S.C. 7532. He sought reinstatement to his job or a remand to the Agency for a full hearing at which he could challenge the decision to revoke his clearance for access to SCI.

The district court granted summary judgment for petitioners (Pet. App. 17a-20a). The court held, inter alia, that respondent was properly removed "for cause" pursuant to the 1959 NSA Act and NSA's implementing regulations. The court concluded that the power to remove is inherent in the power to appoint, and that, although the Secretary could have elected to proceed under NSA's summary

authority in 50 U.S.C. 833, it was not required to do so. The court noted that NSA had in fact provided respondent with greater procedural safeguards by proceeding under its "for cause" regulations than he would have received under 50 U.S.C. 833 (Pet. App. 20a). The court concluded that NSA was similarly not required, merely because the removal implicated national security concerns, to utilize the summary procedures of 5 U.S.C. 7532 (Pet. App. 20a).

3. The court of appeals reversed the district court's decision with respect to the applicability of 5 U.S.C. 7532 and vacated the remainder of the decision (Pet. App. 1a-16a). The court held that the Director of NSA has no authority to remove an employee for cause where the cause for the removal is related to national security. Rather, the court held, an NSA employee may be removed on national security grounds only by the Secretary of Defense acting in person under either 5 U.S.C. 7532 or 50 U.S.C. 833(a).

The court noted (Pet. App. 9a) that the 1959 NSA Act gave the Secretary and his designee no explicit authority to remove NSA employees. The court reasoned that since Section 7532 predated the creation of NSA, any implied removal authority granted to NSA must be limited by Section 7532. "Whatever implicit firing authority may ordinarily be conferred by an explicit grant of hiring authority," the court of appeals stated (Pet. App. 10a), "in this case the 1959 [NSA] Act cannot override a congressional statute that expressly controls terminations in the interests of national security."

The court further held (Pet. App. 10a-13a) that 50 U.S.C. 831 and 832, which prohibit employment of any person at the Agency in a position involving access to classified information unless such access is "clearly consis-

tent with the national security," do not authorize the removal for cause of an employee who fails to maintain his eligibility for such access. "Congress," the court stated (Pet. App. 12a), "did not allow the agency to revoke an employee's security clearance pursuant to § 832(b) and then subsequently dispense with the procedures for dismissing the employee under § 7532." The court of appeals noted that Congress provided NSA with an explicit statutory removal authority (50 U.S.C. 833), but since NSA did not use that authority, the only means of removing respondent in the interests of national security was Section 7532. The court therefore remanded to the Agency for compliance with Section 7532.

SUMMARY OF ARGUMENT

NSA employees are in the "excepted service" for purposes of the CSRA. NSA employees who are preference-eligible veterans are covered by Subchapter II of Chapter 75 of the CSRA (5 U.S.C. 7511-7513), which provides that covered employees may be removed only "for such cause as will promote the efficiency of the service" and establishes substantive and procedural protections governing removals of such employees. Respondent, a non-veteran, was not covered by Subchapter II and had *no* statutory tenure protection. NSA, however, has provided by regulation that its employees may ordinarily be removed only for cause and has prescribed procedural protections (including notice and an opportunity to respond) in connection with "for cause" removals.

As a general rule, failure to satisfy a legal requirement for a position constitutes "cause" for removal from that position. Clearance for access to SCI is a statutory requirement for employment at NSA. It follows that loss of that clearance is "cause" for removal. When NSA determined, after full compliance with its procedures governing the removal of non-preference-eligible employees, that it was no longer clearly consistent with the interests of national security for respondent to have access to SCI, he was removed for cause on the ground that he no longer met a statutory requirement for his job.

Two special statutory provisions, 5 U.S.C. 7532 and 50 U.S.C. 833(a), give the Secretary of Defense the authority, in specified circumstances, to remove an NSA employee on security grounds. The court of appeals, in large part because respondent did *not* have other statutory protection, ruled that NSA could not remove respondent "for cause" but must invoke and follow either Section 7532 or Section 833(a). But, apart from the fact that respondent received greater protections under NSA regulations than either of these statutes affords, the court of appeals stood the relationship between ordinary employee tenure and these two special provisions on its head: Sections 7532 and 833(a) were enacted to enable agencies to bypass statutory and other protections of employees when national security considerations require; they are not exclusive procedures for removing on security grounds someone who could otherwise be removed at will or pursuant to valid regulations.

Section 833(a) says only that the Secretary "may" terminate an individual's employment under certain conditions; it does not purport to afford a mandatory procedure. To the contrary, in order to invoke Section 833(a), the Secretary of Defense must find that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security." This language clearly implies not only that removals may be effected under "other provisions of law" but also that

other provisions are to be used unless the procedures they prescribe would themselves threaten national security. Section 833(a) specifically states that where the specified conditions are met an NSA employee may be removed notwithstanding the statutory provision (Subchapter II of Chapter 75) that gives preference eligibles the right to be removed only for cause; it thus allows the Secretary of Defense to bybass the requirement of cause and related procedures set forth in Subchapter II where security considerations require; it does not in any way bar removals for cause.

Section 7532 states that an agency head "may" suspend and thereafter remove an employee in specified circumstances; like Section 833(a) it is not by its terms a mandatory procedure in any case. Section 7532 may be invoked "[n]otwithstanding any other statutes," but nothing in Section 7532 purports to preclude removal actions taken pursuant to "any other statutes." The court of appeals' statement (Pet. App. 9a) that the ordinary "for cause" procedures cannot be used to "bypass" 7532 inverts the relationship between Subchapter II and Section 7532. Section 7532 was designed to enable the head of an agency to bypass the ordinary procedures for suspending and removing protected employees if he determines that summary action is "necessary in the interests of the national security" (5 U.S.C. 7532(a)). It was not designed to provide employees who do not otherwise have statutory tenure with across-the-board protections against dismissals in the interests of national security.

The court of appeals apparently believed that respondent would receive more protection under Section 7532 than in a "for cause" removal, and that therefore the former procedure must displace the latter. But the premise is wrong and the conclusion does not follow: respondent

received greater protection under NSA regulations than he would have received had the "harsh and drastic" procedures of Section 7532 been invoked (*Department of Navy* v. *Egan,* No. 86-1552 (Feb. 23, 1988), slip op. 14); and the fact that non-preference-eligible employees in the excepted service have *no* statutory tenure protection does not turn Section 7532, a supplementary procedure applicable to a wide range of federal employees, into an exclusive means of removing NSA personnel.

This Court stated in *Cole* v. *Young*, 351 U.S. at 543-544, that employees could be dismissed for cause based on doubts about their loyalty without invoking the summary removal authority granted to agency heads by the predecessor of Section 7532 (the Act of Aug. 26, 1950, ch. 803, 64 Stat. 476). Indeed, the Court stressed (351 U.S. at 546) that "[i]n the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears." The decision of the court of appeals is inconsistent with *Cole* and with recent decisions of the MSPB and the Federal Circuit, which have wide responsibility for federal personnel matters. See *Egan* v. *Department of Navy,* 28 M.S.P.R. 509 (1985), aff'd on this point but rev'd on other grounds, 802 F.2d 1563 (Fed. Cir. 1986), rev'd, No. 86-1552 (Feb. 23, 1988).

The court of appeals' ruling would lead to mischief extending well beyond NSA. Neither the court of appeals nor respondent has suggested any reason why, if Section 7532 displaces the "for cause" removal authority of NSA where the "cause" involves national security, it would not similarly displace the "for cause" provisions applicable to competitive-service employees and veterans at other agencies. If it does, then every routine decision to revoke a required clearance would require procedures suitable to an

immediate threat to national security, including the personal attention of the head of the agency.

ARGUMENT

THE DIRECTOR OF NSA MAY, WITHOUT INVOKING THE SUMMARY DISMISSAL PROCEDURES OF 5 U.S.C. 7532 OR 50 U.S.C. 833, REMOVE "FOR CAUSE" AN EMPLOYEE WHO FAILS TO MAINTAIN A REQUIRED CLEARANCE FOR ACCESS TO CLASSIFIED INFORMATION

Respondent was a non-preference-eligible in the "excepted service." As such, like many similarly situated federal employees, he had *no* statutory tenure protection, see 5 U.S.C. 7511(a)(2); cf. *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988). NSA regulations, however, provided that he could be removed only "for such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4). The court of appeals, in large part because of respondent's very lack of other statutory protection, ruled that NSA must follow either 5 U.S.C. 7532 or 50 U.S.C. 833(a) in removing him. But apart from the fact that respondent received greater protections under NSA regulations than either of these statutes affords (see pp. 33-36, *infra*), the court of appeals inverted the statutory logic: Sections 7532 and 833(a) were enacted to enable agencies to bypass statutory and other protections of employees when national security considerations require; they are not exclusive procedures for removing on security grounds someone who could otherwise be removed at will or pursuant to valid regulations.

Three different procedural paths may lead to the removal of an NSA employee for security-related reasons: an employee who loses his security clearance may be removed "for cause" under Chapter 370 of the NSA regulations (or under 5 U.S.C. 7513 if he is a veteran) because he

does not meet a statutory requirement of his job; an NSA employee may be suspended and removed under 5 U.S.C. 7532 when the Secretary of Defense considers such action "necessary or advisable in the interests of national security"; and the Secretary may terminate the employment of an NSA employee under 50 U.S.C. 833(a) when he "considers that action to be in the interest of the United States" *and* determines that other termination procedures "cannot be invoked consistently with the national security." These procedures have different historical origins, apply to different groups of federal employees (although each group includes NSA employees), are available in different circumstances, and afford different procedural protections. Each procedure is by its terms permissive, rather than mandatory, and Sections 7532 and 833(a) advert expressly to other removal procedures. The court of appeals' ruling that Section 7532 "controls terminations in the interests of national security" and makes "for cause" removal unavailable in any case touching upon security matters is unsupported by text or history and would impose an inappropriate limitation on agencies' ability to remove employees who fail to meet a qualification for their jobs.

A. The Director Of NSA Is Empowered To Remove Employees For Cause, Including Lack Of A Required Security Clearance

1. In the 1959 NSA Act, Congress granted to the Secretary of Defense the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of [NSA]" (§ 2, 50 U.S.C. 402 note).[5] As a general matter, the power to fire

[5] The Secretary has delegated his appointment and removal authority to the Director of NSA. See Delegations of Authority in DoD Directive 5100.23 (C.A. App. 60-65). The Secretary reserved to

is, unless expressly circumscribed, inherent in the power to hire. The district court so noted (Pet. App. 20a), and this Court has so recognized for 150 years. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Crenshaw* v. *United States*, 134 U.S. 99, 108 (1890); *Keim* v. *United States*, 177 U.S. 290, 293-294 (1900); *Shurtleff* v. *United States*, 189 U.S. 311, 315 (1903); *De Castro* v. *Board of Comm'rs*, 322 U.S. 451, 462 (1944); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961); *Arnett* v. *Kennedy*, 416 U.S. 134, 148 (1974) (plurality opinion); *id.* at 181 (White, J., concurring in part and dissenting in part). Nothing in the 1959 NSA Act, or its subsequent amendments, suggests that Congress intended to circumscribe in any way the authority of the Secretary of Defense or his designee to remove employees.

In the Act of Mar. 26, 1964, Pub. L. No. 88-290, § 306(a), 78 Stat. 170, Congress amended the 1959 NSA Act to provide explicitly that the authorities granted therein were to be exercised "without regard to the civil service laws." At that time, the civil service laws provided competitive-service employees with certain tenure rights,[6] and the intended effect of the 1964 amendment was to ensure that NSA employees, other than preference-eligible veterans,[7] would have no tenure rights in their employ-

himself certain specific statutory removal authorities, including the summary dismissal power granted by 5 U.S.C 7532.

[6] Competitive-service employees had the right, under Section 6 of the Lloyd-La Follette Act, ch. 389, 37 Stat. 555, 5 U.S.C. (1964 ed.) 652 to be dismissed only for cause. Such employees also had a right, but only by Executive Order, to appeal a dismissal to the Civil Service Commission. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.).

[7] Preference-eligible veterans had by statute both the right to be dismissed only "for such cause as will promote the efficiency of the service" and the right "to appeal to the Civil Service Commission." Veterans' Preference Act of 1944, ch. 287, § 14, 58 Stat. 390, 5 U.S.C. (1964 ed.) 863.

ment. The House Committee Report that accompanied the 1964 amendment noted that NSA employees had been "administratively excepted by the U.S. Civil Service Commission, pursuant to Executive Order 10440 of March 31, 1953, from the competitive civil service and placed in Schedule A." H.R. Rep. 108, 85th Cong., 1st Sess. 5 (1963). (Schedule A listed those employees in the excepted service. See *Vitarelli* v. *Seaton*, 359 U.S. 535, 539 (1959).) The "[s]tatutory exemption" provided by Section 306(a), the report observed (H.R. Rep. 108, *supra*, at 5), "obviates the possibility that the present excepted employment authority, granted administratively by the Civil Service Commission, might be withdrawn or amended."

NSA employees are thus in the "excepted service" for purposes of the CSRA. See Civil Service Rules § 1.4(a), *reprinted in* 5 U.S.C. 3301 note (defining "excepted service" to include "all civilian positions in the executive branch of the Government which are specifically excepted from the requirements of the Civil Service Act or from the competitive service by or pursuant to statute" or by administrative determination). Under Subchapter II of Chapter 75 of the CSRA, preference-eligible veterans in the excepted service may be removed "only for such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)). Nonveterans at NSA, including respondent, are not covered by Subchapter II (see 5 U.S.C. 7511(a)) and may be removed without cause except as the agency otherwise provides by regulation. See *United States* v. *Fausto*, slip op. 7-9.[8]

[8] NSA employees are also denied most of the limited protections afforded to excepted-service employees by other chapters of the CSRA: Congress excluded the NSA by name from both Chapter 23, barring certain "[p]rohibited personnel practices" (see 5 U.S.C. 2302(a)(2)(C)(ii)), and Chapter 43, governing personnel actions based on unacceptable job performance (see 5 U.S.C. 4301(1)(C)(ii)).

NSA has provided by regulation that an employee may be removed only for "such cause as will promote the efficiency of the service" (NSA/PMM § 370.3-4). NSA employees also share with their CSRA counterparts a right to advance written notice of an adverse action, an opportunity to respond and be represented by counsel, and a written decision (§§ 370.3-5 to 370.3-7). Preference-eligible veterans employed at NSA, like preference eligibles elsewhere in government (see 5 U.S.C. 7511(a)(1)(B)), have the right to appeal an adverse action to the MSPB (NSA/PMM § 370.3-8a(1)). Nonveterans at NSA, however, may not appeal adverse actions to the MSPB (§ 370.3-8a(2)), just as other nonveterans in the excepted service have no right of MSPB appeal under the CSRA (5 U.S.C. 7501(1)).

There is no suggestion in the opinion below, nor has petitioner ever contended, that these regulations are beyond the power of NSA. To the contrary, at least with respect to non-preference eligibles, the regulations circumscribe what would otherwise be NSA's power to remove employees without cause. In sum, the Director of NSA clearly has at least as a general matter the authority to remove employees for cause pursuant to procedures specified in NSA's regulations.[9]

2. As a general rule, failure to satisfy a lawful requirement for a position constitutes "cause" for removal from that position. See, *e.g.*, *Department of Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988) (denial of required clearance);

[9] In *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985), the Court held that due process requires that a tenured public employee be given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." To the extent that the NSA regulations themselves create such "tenure" rights, the requirements of due process outlined in *Loudermill* are fully satisfied by the regulations.

Tennessee v. *Dunlap*, 426 U.S. 312 (1976) (loss of required National Guard enlistment); *Zimmerman* v. *Department of Army*, 755 F.2d 156 (Fed. Cir. 1985) (loss of required Army Reserve status); *Buriani* v. *Department of Air Force*, 777 F.2d 674 (Fed. Cir. 1985) (failure to receive Air Force Reserve promotion required for civilian position); *Jackson* v. *United States Postal Service*, 666 F.2d 258 (5th Cir. 1982) (inability to perform physical requirements of job); *Womer* v. *Hampton*, 496 F.2d 99 (5th Cir. 1974) (dual employment in violation of conflict of interest regulations); *Almazan* v. *Department of Air Force*, 26 M.S.P.R. 318 (1985) (lack of physical and mental ability to perform duties of position).

Clearance for access to SCI is a continuing requirement for employment at NSA. Section 831 (emphasis added) provides that "no person shall be employed in * * * the National Security Agency * * * *or continue to be so employed* * * * [or] have access to any classified information[] unless such employment * * * or access to classified information is clearly consistent with the national security." Section 832(a) provides that "[n]o person shall be employed in, or detailed or assigned to, the Agency unless he has been the subject of a full field investigation in connection with such employment, detail, or assignment, and is cleared for access to classified information in accordance with the provisions of this subchapter."

Sections 831 and 832 authorize, and NSA's regulations establish, procedures by which it may be determined that an existing employee's access to SCI is no longer "clearly consistent with the national security"—with the consequence that the employee must be removed. Section 831 directs the Secretary to prescribe regulations "relating to continuing security procedures" sufficient to assure that

an individual's "continu[ed]" employment is clearly consistent with the national security. The Secretary has promulgated such regulations and NSA followed them here. See DoD Directive No. 5210.45 (May 9, 1964) (C.A. App. 73-76); NSA Reg. No. 30-4 (June 22, 1964) (C.A. App. 77-81).[10]

Section 832(b), which applies to continuing as well as initial clearance determinations,[11] provides that, "in those cases in which the Director of the Agency determines that there is a doubt whether [the employee's] access to that information would be clearly consistent with the national security," a board of appraisal "shall submit a report and

[10] Both NSA Reg. No. 30-4 (C.A. App. 78) and DoD Directive 5210.45 para. IV.B (C.A. App. 74) require boards of appraisal to apply criteria for access to classified information established by the United States Intelligence Board (USIB). The USIB has been abolished, and the Director of Central Intelligence now establishes the relevant criteria. The substantive security standards governing access to SCI are set forth in Director of Central Intelligence (DCID) Directive No. 1/14 (Sept. 1 1983), copies of which have been lodged with the Clerk. In determining whether an employee's continued access to SCI is "clearly consistent with the national security," therefore, a board of appraisal must apply the criteria of DCID 1/14. See DCID 1/14, Annex B; Bonanni Declaration ¶ 6 (C.A. App. 42). The board of appraisal's recommendation in this case accordingly concluded that respondent "d[id] not meet the minimum standards for access to Sensitive Compartmented Information (SCI) as prescribed in DCID 1/14" (C.A. App. 106).

[11] Section 832(b) establishes procedures for "assist[ing] the Secretary and the Director of the Agency in carrying out their personnel security responsibilities," responsibilities that are defined in Section 831 to include ensuring that no employee at NSA shall "continue to be so employed" and have access to classified information unless such continued employment and access is "clearly consistent with the national security."

recommendation on each such a case." Section 832(b) further provides that no person may be cleared for access to classified information "contrary to the recommendations of any such board" unless the Secretary or his designee "shall make a determination in writing that such employment * * * or access to classified information is in the national interest."

Since clearance for access to SCI is a statutory requirement for employment at NSA, loss of that clearance plainly constitutes "cause" for removal.[12] The fact that the clearance requirement relates to national security does not affect the fact that the failure to satisfy this requirement is cause for removal. To the contrary, in *Cole* v. *Young*, 351 U.S. 536, 543 (1956), this Court expressly noted that doubts as to the loyalty of an employee could constitute "cause" for dismissal under the Veterans' Preference Act (§ 14, 58 Stat. 390). "The general personnel laws," the Court observed (351 U.S. at 543 (footnote omitted)), "authorize dismissals for 'such cause as will promote the efficiency of the service,' and * * * a reasonable doubt as to [an employee's] loyalty * * * was recognized as a 'cause' for dismissal under those procedures as early as 1942." If doubts as to the loyalty of an employee constitute "cause" for dismissal then, *a fortiori*, loss of a statutorily required clearance for access to classified information constitutes "cause" for removal. See *Egan* v. *Department of Navy*,

[12] The court of appeals wrongly characterized the requirement of SCI clearance as a mere "administrative rule authorized by the 1964 Act" (Pet. App. 11a). Section 832(a) expressly requires all NSA employees to be cleared for "access to sensitive cryptologic information or material," which is a capsule definition of SCI (see Pet. App. 46a-47a). In any event, however, whether clearance for access to SCI is a statutory or an administrative requirement for employment at NSA is irrelevant. The crucial point is that such access is a *legitimate* requirement that every NSA employee must satisfy.

802 F.2d 1563, 1568-1569 (Fed. Cir. 1986), rev'd on other grounds, No. 86-1552 (Feb. 23, 1988); *Stalans* v. *National Security Agency*, 678 F.2d 482, 483 (4th Cir. 1982); *Hoska* v. *Department of Army*, 677 F.2d 131, 136 (D.C. Cir. 1982).[13]

3. Contrary to respondent's contention (Br. in Opp. 2-3 & n.1), NSA clearly invoked its "for cause" removal procedures in this case. Respondent received a "notice of proposed action to remove you * * * in accordance with the provisions of NSA/CSS Personnel Management Manual (PMM) 30-2, Chapter 370" (C.A. App. 82). Chapter 370 sets forth in Section 3 (Pet. App. 38a) the standards and procedures for removing an employee and specifically provides that an employee may be removed pursuant to that section only for "such cause as will promote the efficiency of the service." When respondents' counsel requested (C.A. App. 218-219) a pre-removal hearing pursuant to 5 U.S.C. 7532, NSA replied (C.A.

[13] "Loyalty" is of course quite a different matter from the constellation of considerations appropriately underlying the determination to grant or deny a security clearance. As this Court noted in *Department of Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), slip op. 9-10 (quoting *Molerio* v. *FBI*, 749 F.2d 815, 824 (D.C. Cir. 1984)):

> A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic."

DCID 1/14, Annex A sets out 10 general factors, in addition to "unquestioned loyalty to the United States," that are relevant to the clearance determination.

App. 220) that the removal was not pursuant to Section 7532, but rather "in accordance with NSA/PMM Chapter 370." Thus, NSA again made clear its intention to rely upon its "for cause" regulations in removing respondent.

NSA fully complied with its procedures governing "for cause" removals. As required by NSA/PMM § 3-5 (Pet. App. 39a), respondent received "advance written notice of the proposed action * * * stating the specific reasons for the proposed action" (see C.A. App. 83-84); an opportunity "to answer orally, in writing or both, and to furnish affidavits and other documentary evidence in support of the answer" (see Pet. App. 2a-3a; C.A. App. 121-144, 147-174, 183-190); representation "by an attorney or other representative" (see C.A. App. 85); and "a written decision with the specific reasons therefor" (see *id.* at 191-192). NSA convened a board of appraisal pursuant to 50 U.S.C. 832(b), which concluded that respondent's continued access to SCI was not clearly consistent with the interests of national security (C.A. App. 106-108). In addition, although not required by the regulations, respondent in this case received a personal meeting with the Director of NSA before the Director issued his final decision (*id.* at 191).

The "cause" for respondent's removal was, of course, related to national security: clearance for access to SCI is a continuing statutory requirement for employment at NSA, and the determination that respondent's access to SCI was no longer "clearly consistent with the national security" (50 U.S.C. 831) therefore required respondent's removal. But respondent's contention that NSA cannot properly have invoked its "for cause" removal procedures, because the cause for removal involved national security, cannot rest on any inherent limitation on the authority of the Director of NSA, pursuant to the 1959 NSA Act and its implementing regulations, to remove employees for cause.

As explained above, failure to satisfy a legitimate requirement of employment is "cause" for dismissal under well-established principles. Respondent was, therefore, properly dismissed for cause unless some *other* statute limits the power of the Director of NSA to dismiss employees for reasons relating to national security. The court of appeals found such limitations in 50 U.S.C. 833 and 5 U.S.C. 7532. But neither statute imposes any such limitation.

B. The Authority Of The Director Of NSA To Remove Employees For Cause Is Not Limited By 50 U.S.C. 833.

Section 833, which grants the Secretary of Defense unreviewable authority to dismiss an employee in the interest of the United States, does not impose any limitation on the authority of NSA to remove an employee under its "for cause" procedures for failure to maintain a required security clearance. By its terms, Section 833 is plainly a permissible alternative mechanism for terminating NSA employees in certain cases, not an exclusive path for all terminations touching upon national security concerns. Section 833 says only that the Secretary "may" terminate an individual's employment under certain conditions; it does not purport to afford a mandatory procedure under any circumstances. To the contrary, in order to invoke Section 833, the Secretary of Defense must find that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security" (50 U.S.C. 833(a)). This language clearly implies not only that removals may be effected under "other provisions of law" but also that other provisions are to be used unless the procedures they prescribe would themselves threaten national security. DoD Directive No.

5210.45 (May 9, 1964) (C.A. App. 75) accordingly provides that Section 833(a) is a last resort:

> When the two conditions [in Section 833] do not exist, the Director, NSA, shall, when appropriate, take action pursuant to other provisions of law, as applicable, to terminate the employment of a civilian officer or employee. The Director shall recommend to the Secretary of Defense the exercise of the authority of [Section 833] only when the termination of the employment of a civilian officer or employee cannot, because of paramount national security interests, be carried out under any other provision of law.

That Congress intended to allow "for cause" removals on national security grounds is also clear from the preamble to 50 U.S.C. 833, which provides that the Secretary's authority may be exercised "[n]otwithstanding sections 7512 and 7532 of title 5." The reference to 5 U.S.C. 7512 is to the "for cause" dismissal protections of the CSRA, protections that are due by statute to preference-eligible NSA employees and that, with the exception of MSPB review, have been afforded by regulation to all other NSA employees. The reference to both Section 7512 and Section 7532 clearly indicates that Congress assumed that removals for cause would continue to occur even in cases with national security implications. See also 50 U.S.C. 832(b) (authorizing boards of appraisal to submit reports and make recommendations on access to classified information, but providing that "appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law").[14]

---

[14] The court of appeals quoted (Pet. App. 11a-12a) both these provisions, but excised the two references to Section 7512. The court then

The court of appeals stated (Pet. App. 13a) that permitting NSA employees to be removed for cause for failure to maintain a security clearance "would render § 833 entirely superfluous." That is plainly incorrect. As outlined above, preference-eligible NSA employees are entitled by statute to a number of procedural protections in connection with a "for cause" removal, including MSPB review, and other employees are entitled by regulation to some of these protections. Section 833 permits the Secretary of Defense, acting in person, in cases in which these procedures "cannot be invoked consistently with the national security," to sweep aside these protections and take immediate and unreviewable action to remove an employee "in the interest of the United States." Far from being superfluous, Section 833 is important to the ability of the Secretary of Defense to protect the national security: it enables him to bypass statutory and other tenure protections of employees where security considerations require; the fact that respondent is a non-preference-eligible, who has no statutory tenure protection in the first place, does not render Section 833 superfluous.

C. The Authority Of The Director Of NSA To Remove Employees For Cause Is Not Limited By 5 U.S.C. 7532

The court of appeals' conclusion that Section 7532 displaces the authority of the Director to remove an employee for cause for failure to maintain a required security clearance runs directly counter to the language of the statute, its legislative history, and prior decisions of this Court and the Federal Circuit. Section 7532 has broader scope than Section 833(a): it gives the heads of several specified agencies the power of removal upon an affirmative determination that such action is necessary or advisable in the interests of national security. But like Section 833(a), Section 7532 is not an exclusive procedure but a means of bypassing the usual methods of removing federal employees where exigent circumstances require. Neither the interests of national security nor the interests of employees would be served by turning it into a mandatory substitute for normal removal procedures.

1. Congress enacted the predecessor of Section 7532 (the Act of Aug. 26, 1950, ch. 803, § 1, 64 Stat. 476-477 (1950 Act)) to give the heads of certain executive agencies the power to take immediate action when necessary to protect the national security. See, *e.g.*, S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950); H.R. Rep. 2330, 81st Cong., 2d Sess. 2 (1950). From the standpoint of both the agency head and the affected employee, it is a drastic remedy. The agency head must act personally and must make affirmative findings that a suspension is "necessary" and then that a removal is "necessary or advisable" in the interests of national security. The employee may be suspended summarily, without process and without pay, and may be removed "after such investigation and review as [the agency head] considers necessary." Permanent employees are entitled, "after suspension and before removal," to notice of charges "as specific[] as security considerations permit," an opportunity to respond, and a hearing "by an agency authority duly constituted for this purpose." 5 U.S.C. 7532. The statute provides that "[t]he determination of the head of the agency is final" (5 U.S.C. 7532(b)), *i.e.*, there is no outside review (*Cole* v. *Young*, 351 U.S. at 546). An

---

asserted (Pet. App. 12a), based on the elided quotations, that Section 7532 was the only alternative mechanism to Section 833 for removing NSA employees on grounds of national security. But the express references to the ordinary "for cause" procedures cannot be so easily ignored. They clearly indicate Congress's intention not only that loss of a security clearance could be cause for dismissal but also that the "for cause" procedures should be used unless they "cannot be invoked consistently with the national security" (50 U.S.C. 833(a)).

employee removed under Section 7532 is not eligible for any position in the agency and may not be appointed to any position elsewhere in the government prior to consultation with OPM (5 U.S.C. 7312).

It is clear from its language that Congress did not intend the summary authority in Section 7532 to be the exclusive means of removing an employee who ceases to qualify for access to classified information. Section 7532 states that an agency head "may" suspend and thereafter remove an employee in specified circumstances. Section 7532 is not by its terms a mandatory procedure in any case.[15] Moreover, Section 7532 states that the agency head may employ its summary procedures "[n]otwithstanding other statutes." The clear implication of that phrase, in conjunction with the permissive "may," is that the agency head may use the summary authority in Section 7532 "[n]otwithstanding [substantive or procedural protections the employee would otherwise have under] other statutes." The words "other statutes" make sense only as referring to statutory provisions, like Subchapter II of Chapter 75, that otherwise permit employees to be removed only "for cause" and afford other protections. The fact that respondent was not protected by Subchapter II does not change the meaning of Section 7532.

The court of appeals' statement that Section 7532 "expressly controls terminations in the interests of national security" (Pet. App. 10a) thus stands the relationship between Subchapter II and Section 7532 on its head. Section 7532 enables the head of an agency to bypass "for cause" removal procedures in the interests of national security,

[15] Indeed, if ordinary removal procedures can be safely employed without compromising national security then it would seem to follow that the suspension without pay that begins the summary procedures of Section 7532 is not "necessary in the interests of national security."

but it does not state or imply that loss of a required clearance is not "cause" for removal in the ordinary manner. The procedures of Section 7532 "may" be invoked "[n]otwithstanding any other statutes," but nothing in Section 7532 purports to preclude removal actions taken pursuant to "any other statutes." Section 7532 is, by its plain terms, an "extra option" (Pet. App. 9a) for the removal of employees who pose a security risk.

2. It is also clear from the legislative history that Section 7532 was not intended to be used routinely, but only when there is an immediate risk to the national security. See *Cole* v. *Young*, 351 U.S. at 546. The proponents of the statute gave assurances that it would be used sparingly and cautiously and only when other, normal procedures were insufficient to protect the national security. See, *e.g.*, *Hearing on S. 1561 and S. 1570 Before a Subcomm. of the Senate Comm. on Armed Services*, 80th Cong., 2d Sess. 2-3 (1948) [hereinafter *Hearing*] (statement of Mark Edwin Andrews, Assistant Secretary of the Navy: "It is our intention to utilize the provisions of this law only in the exceptional cases where no other speedy and sure method is available to protect the national security. * * * * * I wish to reemphasize that the Navy does not intend to use this summary-dismissal legislation * * * except in the most unusual cases.").

The legislative history also confirms that Section 7532 was not designed to provide employees who do not otherwise have statutory tenure with across-the-board protections against dismissals in the interests of national security. Rather, it was designed to cut through the ordinary procedures for suspending and subsequently removing employees protected by other provisions in those circumstances in which such summary action was "neces-

sary in the interests of national security" (5 U.S.C. 7532(a)). See H.R. Rep. 2264, 80th Cong., 2d Sess. 1-2 (1948); S. Rep. 1155, 80th Cong., 2d Sess. 2 (1948); H.R. Rep. 2330, 81st Cong., 2d Sess. 2 (1950); S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950); 96 Cong. Rec. 10028 (1950) (remarks of Rep. Thornberry); *id.* at 10029 (remarks of Rep. Murray).[16] The Act was intended, not to circumscribe, but "to *increase* the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security

[16] The State Department, in a letter quoted in the Senate Report, explained why this additional flexibility, primarily with respect to suspensions, was considered necessary (S. Rep. 2158, *supra*, at 6):

> The bill, when enacted into law, would give the Secretary of State, under permanent authority, a desired flexibility of action not open to him under either the civil-service rules and regulations or loyalty regulations promulgated by the Civil Service Commission. Under existing civil-service rules and regulations, there is no authority to summarily suspend the employment of a permanent employee of the Department without first notifying that employee of the reasons for suspension and affording him an opportunity to reply. The Department feels that such flexibility of action is necessary to the successful operation of an effective personnel-security program, and to counteract the objectives of subversive forces, groups and individuals whose activities are considered incompatible with the interests of the United States.

As the Assistant Secretary of the Navy succinctly expressed the purpose of the bill in his testimony (see *Hearing* 2), "[t]his law might be likened to the shotgun behind the door. We prefer not to use it but if we meet the situation where it must be used we want it to be available." See *id.* at 4 (statement of Hamilton Robinson, Director, Office of Controls, Department of State) (stressing the "very infrequent" need "to eliminate immediately the risk presented by an insecure employee, without the necessity of awaiting the conclusion of lengthy termination proceedings"). See also *id.* at 7 (statement of Arthur Flemming, Commissioner, Civil Service Commission) (summarizing "the regular procedures that are followed in the removal of employees in the executive branch of the Government").

risks, and to terminate their services if subsequent investigation develops facts which support such action." S. Rep. 2158, 81st Cong., 2d Sess. 2 (1950) (emphasis added).

As the Committee Reports noted, the heads of most of the agencies expressly covered by the 1950 Act (see 5 U.S.C. 7531), already had on a temporary basis "the authority which is made permanent under the provisions of the bill." H.R. Rep. 2330, *supra*, at 3. See also S. Rep. 2158, *supra*, at 2-3; H.R. Rep. 2264, *supra*, at 2. This authority to summarily suspend and terminate employees when necessary in the interests of national security was granted to the Army, the Navy and the Air Force during World War II and was continued after the war and extended to the Atomic Energy Commission in 1946 and to the Departments of State and Defense in a series temporary riders to appropriations bills.[17] Under these temporary measures the agency heads had "more drastic powers than contemplated in" the 1950 Act (S. Rep. 2158, *supra*, at 2). "Under present law," the House Report explained (H.R. Rep. 2330, *supra*, at 3), "with respect to the foregoing departments and agencies, the officer or employee who is suspended or terminated as a security risk is not entitled as a matter of right to an appeal to the head of the agency concerned. This legislation extends this appeal right to employees of the Departments of State, Army, Navy, Air Force, the Office of the Secretary of Defense, and the Atomic Energy Commission."

[17] See the Act of June 28, 1940, ch. 440, § 6, 54 Stat. 679; the Act of Dec. 17, 1942, ch. 739, § 3, 56 Stat. 1053; the Department of State Appropriation Act, 1947, ch. 541, 60 Stat. 458; the Atomic Energy Act of 1946, ch. 724, § 12(a)(4), 60 Stat. 771; the Department of State Appropriation Act, 1948, ch. 211, 61 Stat. 288; the Department of State Appropriation Act, 1949, ch. 400, § 104, 62 Stat. 315; the Department of State Appropriation Act, 1950, ch. 354, § 104, 63 Stat. 456; the National Military Establishment Appropriation Act, 1950, ch. 787, § 630, 63 Stat. 1023.

The court of appeals quoted this passage from the House Report out of context and then stated (Pet. App. 9a) that it "effectively shoots down the theory that § 7532 is only an extra option for agencies wishing to fire employees as national security risks." Read in its historical context, however, the passage shows that Section 7532 was indeed an "extra option." The 1950 Act, from which Section 7532 derives, extended an extraordinary wartime authority into peacetime, but it added some procedural protections that did not exist in the wartime versions. Both the wartime and the peacetime versions, however, were extraordinary measures to be used in exigent circumstances, not mandatory means of removing employees who fail to meet job qualifications, merely because security considerations are implicated. Section 7532 is still "the shotgun behind the door" to be used "only in the exceptional cases where no other speedy and sure method is available to protect the national security" (*Hearing* 2).[18]

[18] The court of appeals found (Pet. App. 8a-9a) further support for its reading of Section 7532 in the predecessor of 5 U.S.C. 7533, Section 2 of the 1950 Act (64 Stat. 477), which provided that "[n]othing herein contained shall impair the powers vested in the Atomic Energy Commission by the Atomic Energy Act of 1946 or the requirements of section 12 of that Act that adequate provision be made for administrative review of any determination to dismiss any employee of said Commission." The court of appeals stressed (Pet. App. 9a) that "Congress did not provide any equivalent provision for any other agency covered by § 7532" and viewed that fact as evidence that all national security dismissals in those agencies must proceed under Section 7532. But there was good reason for dealing separately with the AEC, because the AEC had been given a much broader removal power than the special wartime powers given to the other agencies. Section 12(a)(4) of the Atomic Energy Act of 1946, ch. 724, 60 Stat. 771, gave the AEC a general authority to discharge employees "without regard to [the civil-service laws]" whenever "the Commission deems such action necessary to the discharge of its responsibilities." It was this extremely broad and extremely summary special removal power that was not to be displaced by the 1950 Act. This in no way implies that Congress *did* mean to displace the ordinary power of the AEC and every other agency to remove employees for cause.

3. The court of appeals suggested (Pet. App. 9a) that to allow NSA to remove an employee "for cause," after revocation of his security clearance, would allow NSA to "bypass" the procedural protections of Section 7532. Again, this puts the matter backwards. Ordinary "for cause" procedures afford many federal employees (including preference eligibles at NSA) important protections against removal. NSA and other agencies are not allowed to bypass these procedures by invoking the summary procedures of Section 7532 except in appropriate cases. As this Court noted in *Cole* v. *Young*, 351 U.S. at 547, "the 1950 Act, though in form but an exception to the general personnel laws, could be utilized effectively to supersede those laws." The Court accordingly restricted the use of the 1950 Act to those extraordinary circumstances in which there is "an immediate threat of harm to the 'national security' " such that the delay incident to the "normal dismissal procedures" could "cause serious damage to the national security" (351 U.S. at 546). The fact that respondent, as a non-preference-eligible in the excepted service, has *no* statutory tenure, does not change the nature of Section 7532.

The court of appeals apparently reasoned (Pet. App. 12a-13a) that respondent would receive more protection under Section 7532 than in a "for cause" removal, and that therefore the former procedure must displace the latter. But the premise is wrong and the conclusion does not follow: respondent received greater protection under NSA regulations than he would have received had Section 7532 been invoked; and the fact that non-preference-eligible

NSA employees are statutorily excluded from civil service protection does not turn Section 7532, a supplementary procedure applicable to a wide range of federal employees, into an exclusive means of removing NSA personnel.

Under NSA regulations, respondent could be removed only for cause and was entitled to written notice, an opportunity to respond and be represented by counsel, and a written decision. His case was reviewed, first, by a board of appraisal and then by the Director of NSA, who met with respondent and his counsel. Had respondent been a veteran, he would also have had a right of appeal to the MSPB. Respondent was kept on pay status for a period of 16 months while his case was being considered. When the board of appraisal determined that respondent's access to SCI was no longer "clearly consistent with the national security," it nonetheless recommended that NSA endeavor to help respondent find employment elsewhere.[19]

This treatment contrasts sharply with what respondent could have expected under Section 7532, which is designed primarily to deal with immediate threats to national security: summary suspension without pay, notice only to the extent consistent with national security, a single hearing of unspecified scope,[20] and, if the determination were

[19] Although all positions at NSA require SCI clearance, that is not true elsewhere in the Department of Defense or in other agencies.

[20] There has been no authoritative determination of what sort of hearing is required under Section 7532. We note that Section 7532(c)(3)(A) provides that the employee is entitled to a statement of reasons only "stated as specifically as security considerations permit." Section 7532(c)(3)(C) then requires only "a hearing, at the request of the employee, by an agency authority duly constituted for this purpose." In *Egan*, slip op. 14-15, the Court stated that even if Section 7532 entitled the employee to a "trial-type hearing" prior to removal, "we doubt whether removal under § 7532 * * * would have amounted to 'more' procedural protection" than provided under the Navy's "for cause" procedures.

made to remove him, ineligibility for any other position in the Department of Defense or, prior to consultation with OPM, for appointment elsewhere in government. NSA employees would be ill-served if Section 7532 became the standard procedure for all removals based on considerations of national security. In *Egan*, slip op. 14, this Court reviewed the procedures available under Section 7532 and rejected the employee's contention that he "would have received greater procedural protections under § 7532 than he received" under the Navy's "for cause" procedures—procedures comparable to those provided by NSA. Section 7532, the Court stressed (*Egan*, slip op. 14), "provides a procedure that is harsh and drastic both for the employee and for the agency head, who must act personally in suspending and removing the employee."

In any event, the fact that nonveterans at NSA have no statutory tenure protection does not imply that Section 7532 is the exclusive means of removing them. Section 7532 applies to employees of many agencies (see pages 39-40, *infra*), including employees in the competitive service, who do have civil service protection and who receive statutory protections in a "for cause" removal that they do not receive when Section 7532 is invoked.[21] The emergency procedure permitted by Section 7532 does not become a mandatory procedure just because non-preference-eligible personnel of a particularly sensitive agency have been deliberately shorn of statutory protection and relegated to such protections as the agency pro-

[21] A competitive-service employee or veteran removed for cause for failure to obtain or retain a required security clearance is entitled, under 5 U.S.C. 7513, to MSPB and judicial review in addition to agency procedures. See *Department of Navy* v. *Egan, supra*. The Court in *Egan* held that the substance of the clearance determination is not reviewable, but this outside check on the procedures followed by the agency offers a protection wholly unavailable under Section 7532.

vides by regulation. Cf. *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 8-9 (employees who are deliberately excluded from the comprehensive remedial scheme of the CSRA may not obtain from other statutory sources the protections denied them in the CSRA). Furthermore, the court of appeals overlooked the procedures afforded to all NSA employees by regulation. By ignoring the procedures that respondent actually received, the court of appeals has endorsed fewer and harsher procedures for employees generally.

4. The court of appeals' reading of Section 7532 conflicts with this Court's interpretation of the 1950 Act in *Cole* v. *Young*, *supra*. The question in that case was whether an employee of the Department of Health, Education and Welfare could be dismissed on loyalty grounds pursuant to the 1950 Act or was entitled to the "for cause" procedures provided by the Veterans' Preference Act of 1944. This Court noted (351 U.S. at 543) that the summary removal authority granted to agency heads by the 1950 Act is "not the only, nor even the primary, source of authority to dismiss Government employees." The Court stressed (351 U.S. at 544 (emphasis in original)) that "there was no want of substantive authority to dismiss employees on loyalty grounds, and [therefore] the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." After examining the language and history of the 1950 Act, the Court held (351 U.S. at 543, 546) that the employee's dismissal "violated the Veterans' Preference Act" because "[i]n the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears."

The Director of NSA followed *Cole* to the letter in this case. Doubts about whether respondent's continued employment would be consistent with the national security were sufficient to require revocation of his clearance and his consequent removal.[22] But in the absence of an "immediate threat" to the national security, resort to the summary procedures of 5 U.S.C. 7532 was unnecessary, and NSA properly relied upon its "normal dismissal procedures." The court of appeals erred in concluding that the possibility of summary termination under Section 7532 somehow precluded a "for cause" removal of respondent.

The decision of the court of appeals is also inconsistent with recent decisions of the MSPB and the Federal Circuit, which have wide responsibility for federal personnel matters. In *Egan* v. *Department of Navy*, 28 M.S.P.R. 509 (1985), rev'd on other grounds, 802 F.2d 1563 (Fed. Cir. 1986), rev'd, No. 86-1552 (Feb. 23, 1988), a civilian employee of the Navy was removed "for cause" from his job at the Trident Naval Refit Facility in Bremerton, Washington, after being denied a security clearance required by his job. He sought review from the MSPB of the merits of the security clearance determination. The MSPB concluded that, although it could review the procedures utilized by the agency in denying the clearance and removing Egan, it "ha[d] no authority to review the agency's stated reasons for the security clearance determination" (28 M.S.P.R. at 519). The MSPB explicitly decided that the Navy could properly employ its "for cause" procedures in removing an employee who loses or is denied a required security clearance, and was not required to follow the procedures set forth in 5 U.S.C. 7532. The MSPB, after de-

---

[22] DCID 1/14 ¶ 11 provides that "[a]ny doubt concerning personnel having access to SCI should be resolved in favor of the national security and the access should be denied or revoked."

liberately inviting and receiving briefs on the question (see 50 Fed. Reg. 2355 (1985); 49 Fed. Reg. 48623 (1984)), concluded (relying in part on *Cole* v. *Young*, *supra*) that resort to Section 7532 was not even appropriate, much less mandated, in every case in which an employee was removed for loss of a required security clearance (28 M.S.P.R. at 520). The Board accordingly held "that section 7532 is not the exclusive basis for removals based upon security clearance revocations" (28 M.S.P.R. at 521).

On appeal, the Federal Circuit affirmed that aspect of the Board's decision. The Federal Circuit cited *Cole* v. *Young*, *supra*, and noted (802 F.2d at 1568) that "[t]here is nothing in the text of section 7532 or its legislative history to suggest that its procedures were intended to preempt section 7513 procedures whenever the removal could be taken under section 7532." The court stressed that "[t]he language of section 7532 is permissive" and concluded "that Congress intended to provide the agencies with procedural flexibility in effecting the removal of government employees on national security grounds" (802 F.2d at 1568). Accordingly, the court held (*id.* at 1568-1569), "such removal may be brought under either section 7512 or section 7532" and "[t]he agency is responsible for selecting the removal procedure in the particular circumstance."[23]

5. The court of appeals' decision is simply irreconcilable with the statutory mandate that "no person shall be employed in" the Agency or have "access to any classified

[23] The Federal Circuit nonetheless reversed the MSPB, concluding that the Board was required to examine the merits of the underlying security clearance determination in reviewing the "cause" for Egan's dismissal. In reversing the court of appeals on that ground, this Court left open the question whether removals based on lack of security clearance could proceed only under 5 U.S.C. 7532 (*Egan*, slip op. 13 & n.7).

information" unless such employment or access is "clearly consistent with the national security" (50 U.S.C. 831). If the employee fails to meet that "clearly consistent" standard and hence is no longer permitted by statute to have access to classified information, the statute requires that his employment not continue (*ibid.*). Removal under Section 7532, by contrast, requires an affirmative finding that removal is "necessary or advisable in the interests of national security." That is a different standard: a determination to deny access to SCI, on the ground that it is no longer "clearly consistent with the national security," does not necessarily mean there is an immediate danger to national security sufficient to invoke Section 7532. It does, however, mean that the employee no longer satisfies a statutory condition of his employment. Cf. *Department of Navy* v. *Egan*, slip op. 12.

6. The court of appeals' ruling would lead to mischief extending well beyond NSA. The court ruled that a general authority to remove employees for cause is displaced in cases involving national security by 5 U.S.C. 7532. But Section 7532 has no special application to NSA; it also applies to other parts of the Department of Defense and a number of other departments and agencies (see note 4, *supra*). Employees subject to removal under Section 7532 include employees in the competitive service who may be removed "for such cause as will promote the efficiency of the service" under 5 U.S.C. 7512-7513. Neither the court of appeals nor respondent has suggested any reason why, if Section 7532 displaces the "for cause" removal authority of NSA where the "cause" involves national security, it would not similarly displace the "for cause" provisions applicable to competitive-service employees and veterans at other agencies.[24] If it does, then every routine decision to

[24] The court of appeals did stress (Pet. App. 9a) that Section 7532 predates the 1959 NSA Act, but statutes are normally more easily read

revoke a required clearance would require procedures suitable to an immediate threat to national security, including the personal attention of the head of the agency. Even if the "necessary or advisable" standard of Section 7532 could be stretched to accommodate such cases (as would be necessary if the "clearly consistent" test of 50 U.S.C. 831 and other statutes is to be complied with), the burden upon the agencies and consequent inefficiency would greatly handicap efforts to protect the national security.

Finally, the court of appeals overlooked an additional difficulty that would result from its decision. The line between removals for reasons of national security and removals that "promote the efficiency of the service" in other ways is not always clear: for example, an employee found selling drugs, or engaging in theft or other dishonest conduct, might be subject to a "for cause" removal for the misconduct itself and also to revocation of his security clearance on the ground that his continued access to classified information is not "clearly consistent with the interests of the national security." If removals on national security grounds *must* proceed under Section 7532, then agencies, the MSPB, and the courts would become enmeshed in disputes over whether any given removal was or was not on national security grounds. The court of appeals' notion that an employee may *not* be removed for cause for failure to maintain a required clearance is plainly wrong.

---

to displace prior enactments than subsequent ones. In any event, whatever the relevance of that point, Section 7532 also predates the Civil Service Reform Act of 1978.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LOUIS R. COHEN
Deputy Solicitor General
MICHAEL K. KELLOGG
Assistant to the Solicitor General
BARBARA L. HERWIG
FREDDI LIPSTEIN
Attorneys

MAY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60431

QUESTION PRESENTED

Whether an employee of the National Security Agency, dismissed "in the interests of national security" is entitled to a hearing pursuant to 5 U.S.C. 7532, when the summary termination authority in 50 U.S.C. 833 is not invoked.

TABLE OF CONTENTS

STATUTORY PROVISIONS INVOLVED 1
STATEMENT 1
A. The Statutory And Regulatory Framework 1
B. The Facts And Proceedings Below 4
SUMMARY OF ARGUMENT 8
ARGUMENT 12
I. AS A MATTER OF LAW AND FACT, RESPONDENT WAS TERMINATED FOR "NATIONAL SECURITY" REASONS AS OPPOSED TO "CAUSE," AND HAVING LITIGATED IN THE LOWER COURTS ON A NATIONAL SECURITY THEORY, RESPONDENT MAY NOT NOW SWITCH TO A NEW THEORY 12
A. Petitioner's Firing Was For "National Security" Reasons As Such Term Was Defined In *Cole* v. *Young* 12
B. Having Litigated Both In The District Court And The Court Of Appeals On The Theory That This Was A "National Security Case" And Having Generated Two Federal Court Opinions That Treated The Case As Such, The Government Is Now Precluded From Disavowing Its Theory And Treating The Matter As Merely One Of A Termination For "Cause." 16
II. CONGRESS MANDATED A HEARING, PURSUANT TO 5 U.S.C. 7532, WHEN NSA TERMINATES AN EMPLOYEE "IN THE INTEREST OF NATIONAL SECURITY" WITHOUT INVOKING 50 U.S.C. 833 .. 17
A. Administrative Practice And Congressional Intent Dictate Affirmance 17
B. *Egan* v. *Department Of Navy* Does Not Control This Case And Is Distinguishable 35
III. PLAINTIFF WAS IMPROPERLY DEPRIVED OF PROCEDURAL PROTECTIONS AFFORDED BY INTERNAL REGULATIONS OF THE DEPARTMENT OF DEFENSE AND NSA 38
CONCLUSION 41

TABLE OF AUTHORITIES

CASES: Page
Bell v. *Bruen*, 1 How. 169 (1843) 17
Caminetti v. *United States*, 242 U.S. 470 (1917) 24
Cole v. *Young*, 351 U.S. 536 (1956). 9, 13-14, 15, 16, 17
Doe v. *Weinberger*, 820 F.2d 1275 (D.C.Cir. 1987) 8
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 17
Egan v. *Department of Navy*, 28 M.S.P.R. 509 (1985) *rev'd*, 802 F.2d 1563 (Fed. Cir. (1986) *rev'd*, No. 86-1552 (U.S. Supreme Court, Feb. 23, 1988) ... 11, 35, 36, 37, 38
Greene v. *McElroy*, 360 U.S. 474 (1959). 40
Hennen, Ex Parte, 38 U.S. (13 Pet.) 230 (1839). 20
Long v. *Stenson*, 465 U.S. 886 (1983) 24
Schenfeld v. *Norton*, 391 F.2d 420 (10th Cir. 1968) 17
Service v. *Dulles*, 354 U.S. 363 (1957) 40
Thomas v. *Taylor*, 224 U.S. 73 (1912) 17
United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) 17
United States v. *Missouri Pac. R.*, 278 U.S. 269 (1929) . 24
Vitarelli v. *Seaton*, 359 U.S. 535 (1959). 9, 21, 40
Wilbur v. *United States*, 284 U.S. 231 (1931) 24

STATUTES
P.L. 89-380 3
5 U.S.C. 7513 ..... 35, 36
5 U.S.C. 7531 ..... 7, 18
5 U.S.C. 7532 ..... *passim*
5 U.S.C. 7533 23
50 U.S.C. 402 note (1959 NSA Act). 1, 2, 10, 19, 21, 22
50 U.S.C. 831-835 (P.L. 88-290). ..... *passim*

EXECUTIVE ORDERS
Executive Order 10450, 18 F.R. 2489, 3 C.F.R. 936 (1949-1953 Comp.). 1, 3, 9, 10, 11, 18
Executive Order 12333, Sec. 1.12(b). 13

LEGISLATIVE HISTORY
80th Cong., 2d Sess. (1948):
S. Rep. 1115. ..... 28, 20

Table of Authorities Continued

	Page
H.R. Rep. 2264	29
81st Cong., 2d Sess.(1950):	
S. Rep. No. 2158	24, 28, 32
H. R. Rep. No. 2330	23, 25, 28
Hearings before Committee on Post Office and Civil Service on H.R. No. 7439	25, 28, 32
Hearings before Senate Committee on Armed Services on H.R. 7439	27, 31
96th Cong. Rec.	25, 26, 29, 30, 32, 33-34
88th Cong., 1st Sess. (1964):	
H. R. Rep. 108	26
109 Cong. Rec.	27, 30-31
DIRECTIVES AND REGULATIONS	
Department of Defense Directives:	
No. 5100.23	2, 10, 19, 23
No. 5210.8	3
NSA Personnel Management Manual (NSA/PMM) 30-2:	
Chapter 370	*passim*
Chapter 371	*passim*
MISCELLANEOUS	
"Sensitive Compartmented Information: Committee, Director of Central Intelligence	13

STATUTORY PROVISIONS INVOLVED

In addition to the statutes and regulations cited by the Petitioners, Executive Order 10450 of April 27, 1953, 18 FR 2489, 3 CFR 936 (1949-1953 Comp.), and Chapter 371 of NSA Personnel Management Manual 30-2, both apply and are set out at App. 1(b)-8 (b) and 9 (b) - 15(b) of Respondent's Opposition to Petition For A Writ of Certiorari.(Opp. App.)[1]

STATEMENT

A. The Statutory And Regulatory Framework

The National Security Agency Act of 1959, 50 U.S.C. 402 note (the 1959 NSA Act) gave the Secretary of Defense, or his designee, the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of" NSA (C. A. App. 46).

The Act is silent as to the authority of the Secretary of Defense, or his designee, to terminate the employment of officers and employees in positions at the NSA. The Act contains many administrative authorities regarding personnel and employment at that Agency.[2]

---

[1] "C.A. App." refers to the Joint Appendix filed in the Court of Appeals, copies of which have been lodged with the Clerk. Most other record references are contained in the Appendix to the Government's Petition for Certiorari ("Pet. App."), and others in Respondent's opposition thereto ("Opp. App.").

[2] Section 12(a)(1)(E) (C.A. App. 52) does provide for removal or suspension of senior civilian cryptologic personnel in the Senior Cryptologic Executive Service. While this is not applicable to the case at hand, the fact that such removal authority is reserved to the Secretary of Defense and not delegated to the Director of NSA is support for Respondent's position here.

The Secretary of Defense delegated some of his authority under the 1959 NSA Act to the Director of NSA in DoD Directive No. 5100.23 (C.A. App. 56-59). This DoD Directive contains no delegation of authority to NSA to terminate employment "for such cause as will promote the efficiency of the service" or in the interest of national security, yet it provides other delegations of authority regarding the personnel security responsibilities of the Director of NSA. In fact, under 5100.23, termination authority in the interest of national security is expressly withheld:

> 10. Authorize the suspension, *but not to terminate the services of an employee in the interest of national security* in positions within the NSA, in accordance with the provisions of 5 U.S.C. 3571, 5594, 7312, 7532, Executive Order 10450, dated April 27, 1953, as amended, and DoD Directive 5210.7, dated September 2, 1966. (Emphasis added.) (C.A.App. 62.)

The NSA regulations promulgated to implement the personnel aspects of the aforesaid Act and DoD Directive are set forth in the NSA Personnel Management Manual (NSA/PMM) 30-2 (August 12, 1980). Chapter 370 thereof sets forth the general standards and procedures for removing an employee (Pet. App. 36a -43a). Chapter 370 clearly does not apply to "a suspension or removal taken in the interest of national security." (Sec. 3-2(a) Pet. App. 38a.) It does apply only to "actions . . . for such cause as will promote the efficiency of the service." (Sec. 1-2 "Authority of the Agency," C.A. App.66.)[3]

Chapter 371 of the aforesaid NSA regulations prescribes the policies and procedures governing actions to

[3] This regulation cites no statutory authority nor does it cite any DoD Directive for authority to remove personnel.

limit access to classified information, suspend and/or terminate civilian personnel of NSA *for reasons of national security.* This part of the NSA regulations expands the procedural rights afforded in Chapter 370 above in that an NSA employee can be terminated for reasons of national security only by the Secretary of Defense; can request a hearing by a duly constituted agency authority; is entitled to a review of his case by the Secretary of Defense and a written statement of the Secretary's decision. Further, prior to preparation of the letter of charges proposing termination, NSA is required to consult with the General Counsel of the Department of Defense (Opp. App. 9b-15b).[4]

While Chapter 370 does provide a standard for removal of NSA employees, it clearly cannot apply to a suspension or removal taken in the interest of national security (Pet. App. 38a). Petitioners are correct in stating that non-veterans such as Respondent herein, have no right of appeal to the Merit System Protection Board. However, if they are being terminated for security reasons, they do have a right to a hearing and review at the level of the Secretary of Defense as shown above (Opp. App. 10b-13b).

As noted by Petitioners, a more vigorous personnel screening process is necessary at NSA. All NSA employees are cleared at the level of Sensitive Compartmented Information (SCI). (See Footnote 3 of Petitioner's Brief, p. 4.) Because of this, Congress provided for summary termination authority in 50 U.S.C. 833 (a) (C.A. App. 71). Petitioners did not use this authority in removing Doe,

[4] This regulation cites, *inter alia*, the following authority: 5 USC, Section 7532, as amended: P.L. 88-290 (codified as 50 USC 831 *et seq.*); P.L. 89-380 "the Back Pay Act of 1966"; DoD Directive 5210.8 and E.O. 10450 (Opp. App. 10b).

who had access to SCI information as part of his duties as a Cryptographic Material Control Technician, and occupied a sensitive position designated as such in the interests of national security (C.A.App. 42).

Congress made other provisions for personnel security at NSA in 50 U.S.C. 831-835 (C.A. App. 70-72), including the specific termination authority in 50 U.S.C. 833. The Department of Defense and NSA implementation of the authorities, policies and standards, and indeed all aspects of 50 U.S.C. 831 *et seq.* are spelled out rather clearly in Chapter 371 of the NSA Personnel Management Manual (Opp. App. 9b-15b). This includes implementation of the statutory direction to the Secretary of Defense that no person is to be employed by NSA, or granted access to classified information, unless such employment or access is "clearly consistent with the national security" (50 U.S.C. 831). Chapter 370 of the NSA Personnel Management Manual has not a single provision implementing this statutory standard of security clearance or any other provision of 50 U.S.C. 831 et seq. (C.A. App. 66-69). Chapter 370 does not provide that this statutory standard for clearance is to be included in the inherent authority claimed in Section 1-2 thereof. Nor does it provide in that same paragraph that action taken "for such cause as will promote the efficiency of the service" encompasses implementation of the statutory standard Congress imposed in 50 U.S.C. 831 ("clearly consistent with the national security").

B. The Facts and Proceedings Below.

Respondent became employed with the National Security Agency (NSA) in April of 1968. He was promptly cleared for access to Sensitive Compartmented Information (SCI). His work received overall ratings of "Excellent" in the years 1978 through 1980. Respondent received an "outstanding" rating in 1981 for implementation of security regulations and maintenance of records. (C.A.App. 6-7, 16-17.) In his employment at NSA, Respondent had an "indefinite appointment." He had "completed his probationary or trial period" and "is (and has been at all times) a citizen of the United States" (see 5 U.S.C. 7532(c) (1-3)).

In the course of a drug investigation at NSA,[5] in March 1982, Respondent voluntarily described two NSA-approved vacation trips to Haiti and one to Santo Domingo, where he had engaged in short, one-time, unrepeated-with-the-same individual, homosexual acts with three *unidentified* males. (C.A.App. 123, 124.)

The record does not show any investigative effort by NSA to identify and ascertain the citizenship of these unidentified males. Nevertheless, Respondent received a notice of proposed action to remove him from his NSA position because his "continued access to SCI" was not "clearly consistent with the national security." (C.A. App. 83.) The record contains no proof that Respondent's associations were with foreign nationals as opposed to vacationing U.S. citizens. He denied under oath any knowledge that these persons were foreign nationals. (C.A.App. 134, 144.) Nowhere in the record is there even one allegation that Respondent ever disclosed classified information to foreign nationals or to any unauthorized person.

Respondent offered to undergo interviews and examinations by NSA psychiatrists to demonstrate he was not

---

[5] Respondent was found to have *no* involvement with illicit drugs and Petitioners never have contended otherwise.

a security risk. An NSA contract psychiatrist examined Respondent and rendered a generally favorable report, which indicated that his "diagnosis cannot be established firmly without more extensive clinical interviewing and psychological testing" (C.A.App. 105). He did not consider Respondent's homosexuality to be "a mental disorder." *Id.*

On January 3, 1983, a Board of Appraisal had been convened by the Director, NSA, to appraise Respondent's loyalty and his suitability for access to classified information pursuant to Public Law 88-290 (50 U.S.C. 831). Unbeknownst to Respondent or his counsel, the Board of Appraisal requested a second report from its psychiatrist. Without conducting any additional interviewing or testing, this psychiatrist filed a second report generally unfavorable to Respondent (C.A. App. 109-117).

Thereafter, the Board of Appraisal concluded that Respondent's "access to classified information is clearly inconsistent with the national security." (C.A. App. 108.)

Because the Board based its findings on the second report by the NSA contract psychiatrist and ignored his first report, Respondent sought a separate psychiatric review of the two NSA reports by a well-qualified, independent psychiatrist. (C.A.App. 181.) This psychiatric review was part of Respondent's submission to the Director of NSA, which highlighted the inconsistent and contradictory aspects of the two NSA evaluations. Respondent criticized the second NSA psychiatric report as containing inaccuracies, speculation, and use of hypothetical situations rather than facts in drawing its unfavorable conclusions (C.A. App. 136-139).

Despite NSA regulations requiring specific reasons for the proposed adverse employment action (Ch. 370.3 and

371.2), (C.A. App. 67, 230), the NSA Director terminated Respondent for reasons for which Respondent had never received prior notice. (See C.A. App. 191-192).

> d. The argument that four brief, short-lived homosexual acts five - six years ago in Haiti and one and one half - two years ago in Santo Domingo offer little risk of blackmail rather obviously overlooks an admitted record of well over 100 other similarly casual (hence indiscriminate (and promiscuous)) homosexual acts. Frankly it is the indiscriminate pattern of activity which invites the risk of security exploitation rather than the specific homosexuality of it.

This final decision of the Director thus terminated Respondent for his overall lifestyle and not on the basis of the "specific reasons" included in the 1982 NSA notice of proposed action (C.A. App. 82-84). Respondent never received the final decision quoted above until the filing of the Government's Motion for Summary Judgment in the District Court. Petitioner was thus denied an opportunity to answer and have benefit of counsel with regard to this reason for his termination.

The Director, NSA, by letter dated February 21, 1984, advised Respondent that his employment would be terminated effective March 9, 1984, because his "access to classified information is not clearly consistent with the national security" (C.A.App. 193). Never in the record in this case does language appear that Respondent was terminated "only for such cause as will promote the efficiency of the service." Respondent then repeatedly requested that Petitioners afford him a hearing by a duly-constituted authority, as provided in 5 U.S.C. 7531 and 7532 prior to termination of his employment. Both Petitioners refused these requests for a hearing (C.A. App. 216-225).

Respondent filed a Complaint for Declaratory and Injunctive Relief, in U.S. District Court, complaining, *inter alia*, that his employment with NSA of sixteen years duration was unlawfully and unreasonably terminated and that he had been denied his statutory right to "a hearing by an agency authority duly constituted . . . under 5 U.S.C. 7532." The District Court granted Petitioners' Motion for Summary Judgment (C.A. App. 32). Appeal to the District of Columbia Circuit followed. That Court reversed, holding that Respondent is entitled to an administrative hearing under 5 U.S.C. 7532. The remainder of the District Court's decision was vacated, without any opinion on the ultimate disposition of Respondent's remaining statutory and constitutional claims. The action was remanded to the District Court for an appropriate order directing the Secretary of Defense to act pursuant to 5 U.S.C. 7532. *Doe* v. *Weinberger*, 820 F.2d 1275 (1987). The Government's Petition for Writ of Certiorari was granted on February 29, 1988.

SUMMARY OF ARGUMENT

It is clear that throughout the course of the administrative proceedings Respondent was denominated a security risk. At no time was he suspended or dismissed "only for such cause as will promote the efficiency of the service," but always as a person whose continued access to classified information is not clearly consistent with the national security." (Termination Letter, C.A. App. 193.) Respondent's position at NSA, wherein he had to have not only access to Sensitive Compartmented Information (SCI), but also control of SCI, made him a member of the class of government employees to which the National Security Act of 1950 and its procedures in 5 U.S.C. 7532 applied. The sensitive mission of NSA, Respondent's access to classified information and the administrative

standard used to terminate Respondent's employment made this a case concerning "national security" within the meaning of this Court's decision in *Cole* v. *Young*, 351 U.S. 536 (1956). Accordingly, Respondent was denied the specific statutory protections afforded an employee accused of being a security risk, which include a hearing by an agency authority duly constituted and a review of his case by the Secretary of Defense or his designee.

The Government's position that Respondent's termination was "for cause" is heard for the first time in this Court. The Government chose to litigate both in the District Court and in the Circuit Court of Appeals on the unreviewability of the revocation of a security clearance. A security clearance case is a security risk case, and a security risk cannot be cleared because of the danger to national security. Having lost below, Petitioners should not be allowed to assert, for the first time in this Court, its "for cause" theory. A similar tactic was rejected long ago by this Court in *Vitarelli* v. *Seaton*, 359 U.S. 535, 545-46 (1959).

By its express terms, 5 U.S.C. 7532 mandates a termination hearing and review at Secretary of Defense level in this case. Not only is the Congressional Directive in Section 7532 clear, but also Executive Order 10450 compels the hearing and department head review that the Court of Appeals said was mandated in Respondent's case. The Government's "three separate procedural routes" argument is belied by NSA's administrative practice in this case. Its attempt to suggest that the termination here took place only pursuant to the 1959 NSA legislation fails when it is seen that a Board of Appraisal, pursuant to the 1964 NSA Act, was here utilized. The reliance on Chapter 370 of NSA regulations alleged by Petitioners to stem from its inherent power to hire cannot sustain the termi-

nation of employment in this case because the standard in Chapter 370 was never utilized. Rather the security standard of Chapter 371 (regulations to implement 5 U.S.C. 7532 and E. O. 10450) was, in fact, relied upon administratively by NSA in terminating Respondent. In addition, the 1959 Act requires a delegation of authority from the Secretary of Defense to the Director of NSA. By DoD Directive No. 5100.23, the Secretary of Defense expressly withheld from the Director of NSA the power to terminate an NSA employee on national security grounds. Finally, in this regard, the Government's argument based on implied termination authority stemming from the power to hire and appoint, if accepted, would constitute a repeal by implication of the 1950 Act (7532), a legislative construction which is not favored by the judiciary.

Petitioner's complaint in this case is a problem of their own doing. Had they sought to terminate Respondent for cause, they could have fairly administratively considered the merits of any alleged "cause" below and permitted Respondent to test the same. Having chosen to avoid any substantive issue of cause by merely declaring Respondent a security risk, NSA and the Department of Defense must honor the Congressional mandate of procedures that accompany security cases. If, indeed, Congress had given the Director of NSA power to terminate in security cases by its 1959 NSA legislation, Congress would not have explicitly recognized the existence of 7532 appeal rights in passing legislation in 1964, which gave the Secretary of Defense summary termination authority (not utilized here).

Although Respondent submits that the plain language of 5 U.S.C. 7532 makes resorting to legislative history unnecessary for affirmance of the D.C. Circuit here, a

complete review of the involved legislative history demonstrates (1) that Congress intended that all employees (including those in the excepted service) have departmental-level hearing and review rights in security cases; (2) that minor indiscretions of the type Respondent was accused of here, as opposed to disloyalty, were felt by Congress to trigger 7532 rights; (3) that review by the Secretary of Defense was made mandatory as the result of a Congressional compromise to avoid Civil Service Commission involvement in security cases; and (4) appeal to the Agency head (here the Secretary of Defense) was intended to insure fairness by virtue of the political accountability of that high office to the President and the Congress.

For several reasons, this Court's recent decision in *Egan* v. *Department of Navy*, ___ U.S. ___ (No. 86-1552 Feb. 23, 1988) is distinguishable. Most important, this Court, in that case, specifically stated it was not purporting to decide the issue of whether or not 7532 hearing and review were mandatory in a case such as this.

Finally, if the Government's position on the application of 7532 is accepted, NSA's termination of Respondent runs afoul of administrative due process problems of constitutional dimension. NSA takes the position that it terminated Respondent for cause under Chapter 370 of its regulations. The record, however, consistently shows that his case was judged on an administrative standard of whether or not his continued access to SCI was clearly consistent with national security. Such a standard is not contained in Chapter 370, but only in Chapter 371, which was never invoked by NSA and which is expressly intended to implement Executive Order 10450 and to give an employee charged as a security risk rights akin to those found in Section 7532.

ARGUMENT

I. AS A MATTER OF LAW AND FACT, RESPONDENT WAS TERMINATED FOR "NATIONAL SECURITY" REASONS AS OPPOSED TO "CAUSE," AND HAVING LITIGATED IN THE LOWER COURTS ON A NATIONAL SECURITY THEORY, RESPONDENT MAY NOT NOW SWITCH TO A NEW THEORY.

A. Petitioner's Firing Was for "National Security" Reasons As Such Term Was Defined in *Cole* v. *Young*.

In the District Court in this case, Petitioners filed a sworn declaration by NSA's Deputy Director of Administration, Mr. Louis J. Bonnani (C.A.App. 39-45). In paragraph 4, he stated:

> Congress . . . recognized the extremely sensitive nature of employment at NSA by enacting a statute (P.L. 88-290) prescribing the personnel security procedures at NSA (50 U.S.C. Sections 831-835) . . . This Act creates a mandatory standard for employment at NSA. Section 831 states that: . . .
>
> > (1) that no person shall be employed in or detailed or assigned to, the National Security Agency . . . or continue to be so employed, detailed, or assigned; and
> >
> > (2) that no persons so employed, detailed, or assigned shall have access to any classified information;
>
> unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security.

Mr. Bonnani then goes on to describe the required clearance at NSA for "Sensitive Compartmented Information (SCI)" . . . "data about sophisticated technical systems for collecting intelligence and the information collected by those systems" which is "extremely sensitive and fragile." Clearance for "Secret or even Top Secret" does not automatically guarantee SCI access approval (*Id.* 41).[6]

The article "SCI Characteristics" was set out by way of appendix to that brief of the Government, and in this Court appears at Pet. App. 44a-51a. The article refers, *inter alia*, to "classic espionage operations;" neutralization of SCI as "akin to the loss of a whole agent network;" "risks to the national security attendant to a lack of knowledge of what our adversaries are up to" (Pet. App. 47a); "the lessons of Pearl Harbor;" "extraordinary sensitivity and fragility from a security standpoint" (Pet. App. 48a); "the security of our secrets depends . . . upon every person granted access;" "our security can be breached" (Pet. App. 51a). Read in its entirety, this document leaves no doubt that we are here concerned with the type of security risk this Court held to trigger 5 U.S.C. 7532 in *Cole* v.

---

[6] In its brief in the Court of Appeals, pp. 3-4, Justice Department counsel emphasized the national importance of the security clearance at issue in this case as follows:

> NSA's mission includes the collection of information from foreign electromagnetic signals in order to provide current, nearly instantaneous and highly reliable foreign intelligence information to the intelligence community of the government and to national policymakers. Equally important to NSA's mission is the protection of signals intelligence (JA 40, Para. 3). See also Executive Order 12333, Sec. 1. 12(b).
>
> The methods NSA uses to carry out this mission, as well as the intelligence product, fall within the especially sensitive category of classified information identified as Sensitive Compartmented Information or SCI. SCI includes "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." See "Sensitive Compartmented Information: Characteristics and Security Requirements," prepared by The Security Committee, Director of Central Intelligence, June 1984, 1 (hereafter cited as "SCI, Characteristics"). (Footnote omitted.) "Communications intelligence * * * is the classic example of SCI * * * "(*id.* at 2).

Young, 351 U.S. 536 (1956). Accordingly, the Court is referred to this article in its entirety.

Respondent was a Cryptographic Material Control Technician at NSA and as such had access to and control of some of the most confidential and sensitive documents in that agency's intelligence-gathering function (C.A. App. 42). Given the mission of the National Security Agency and Respondent's sensitive position there, it cannot be reasonably argued that the revocation of his security clearance and his termination were done on other than national security grounds. Indeed, the Director of NSA convened a Board of Appraisal pursuant to 50 U.S.C. 832(b), which "board shall appraise the loyalty and suitability of persons for access to classified information" (C.A. App. 71).

Finally, the Director of NSA formally terminated Respondent with words "while I find much attractive about (Doe) and his work record and performance, I also find him significantly flawed in his off-duty behavior and a potential security risk" (C.A. App. 192). His February 21, 1984 termination was because Respondent's "access to classified information is not clearly consistent with the national security" (C.A. App. 193).

In 1955, this Court settled the meaning of the term "national security" in this context in *Cole* v. *Young*, 351 U.S. 536 (1956). Referring to the National Security Act of 1950 (the same statute at issue here), *Cole* held that "those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or aggression" are within the purview of the 1950 Act (351 U.S. at 544). The court found it significant that eleven agencies, including the one at issue here, the Department of Defense, were specifically singled out as

being subject to the Act *(Id). Cole* gave an example of "security risks" as those "employees having access to classified materials" (351 U.S. at 550).[7]

Certainly, Respondent's position was the type of employment felt to be "sensitive" which "could bring about . . . discernable adverse effects on the Nation's security," (351 U.S. at 546). See this Court's citation of legislative history for the meaning of the words "security risks" that would trigger 7532 application. At 351 U.S. 550, this Court quoted Mr. Larkin, a representative of the Department of Defense, which department had requested and drafted the bill:

> They are security risks because of their access to confidential and classified material. * * * But if they do not have classified material, why, there is no notion that they are security risks to the United States. They are security risks to the extent of having access to classified material.[14]

[14] Hearings, House Committee on Post Office and Civil Service, on H.R. 7439, 81st Cong., 2d Sess., p. 67.

Thereafter, this Court quoted from further legislative history to the effect that the Act was not intended to apply to employees "not in sensitive job(s) . . . (who) cannot prejudice our security because he does not have access to any of the classified or top secret material." *Id.* at 72. Accordingly, the Court relied upon the precise factor of "access to classified information" that makes

[7] The court quoted significant portions of the legislative history of the National Security Act, all of which support Respondent's position here.

Doe's employment so clearly distinguishable from that of HEW's food and drug inspector at issue in *Cole*..

As a matter of fact from the record and as a matter of law under *Cole* v. *Young*, Respondent's termination here was on "national security" grounds and not "for cause" as is alleged for the first time in this Court.

B. Having Litigated Both In The District Court And The Court Of Appeals On the Theory That This Was A "National Security Case" And Having Generated Two Federal Court Opinions That Treated The Case As Such, The Government Is Now Precluded From Disavowing Its Theory And Treating The Matter As Merely One Of A Termination For "Cause".

In a strategic effort to reshape its theory of the case, the Government, for the first time in this Court, casts the question as "whether an employee of NSA who fails to maintain a required security clearance for access to classified information can be removed 'for cause' without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833." While it argued in favor of inherent authority to terminate employment, the Government's lengthy Motion for Summary Judgment in the District Court and its brief in the Court of Appeals will be searched without success for any mention of the words "for cause" as a reason for Respondent's termination at NSA. Indeed, its lengthy arguments below espousing non-reviewability of security clearance decisions are, to a large extent, at odds with the position that this is not a "national security case" as defined by *Cole* v. *Young*. Both the opinion of the District Judge and the D.C. Circuit never mentioned the words "for cause" and never dealt with any government argument that Doe was fired for cause as opposed to national security grounds.[8]

[8] The court of Appeals expressly did find that "(t)he agency's own justification for . . . terminating Respondent's employment at NSA was "national security," within the meaning given that term by . . ." *Cole* v. *Young*. (Pet. App. 8a). That Court cited the Director's decision to terminate and the Board of Appraisal recommendation (C.A.App. 192 and 108).

Traditionally, this Court has insisted that a litigant present only legal theories that were considered by lower courts. Where the ground of defense has not been brought to the attention of the lower court, this Court is not at liberty to consider the questions. *Bell* v. *Bruen*, 1 How. 169, 187 (1843); *Thomas* v. *Taylor*, 224 U.S. 73, 84 (1912); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n. 5 (1967); *Dothard* v. *Rawlinson*, 433 U.S. 321, 340 (1977) (opinion of Mr. Justice Renquist with whom Chief Justice Burger and Mr. Justice Blackman joined concurring in the result and concurring in part). *Schenfield* v. *Norton*, 391 F.2d 420, 424 (10th Cir. 1968).

II. CONGRESS MANDATED A HEARING, PURSUANT TO 5 U.S.C. 7532, WHEN NSA TERMINATES AN EMPLOYEE "IN THE INTEREST OF NATIONAL SECURITY" WITHOUT INVOKING 50 U.S.C. 833.

A. Administrative Practice and Congressional Intent Dictate Affirmance.

The Government's brief (pp. 14-15) argues that NSA has three distinct "procedural paths" or options in terminating an employee. Without supporting authority, it is argued that these distinct routes are entirely "different" in "historical origin" and the "groups of Federal employees" to which they apply. Conceding that all three of the procedural options apply to employees of NSA, the thrust of the argument is that once an option is selected by NSA, that option's distinct procedures are employed and no other, regardless of broad language utilized by Congress

and (apparently) regardless of how NSA itself treats the particular case.

This argument fails for a number of reasons:

1. Executive Order 10450, in Section 5 (C.A. App. 250), states that cases where employment "may not be clearly consistent with the interests of the national security," *shall* be reviewed or re-adjudicated in accordance with 5 U.S.C. 7532. The NSA regulation, last mentioned above (Chap. 371, C.A. App. 227-233), was promulgated to implement E. O. 10450 and 5 U.S.C. 7532. E. O. 10450 thus mandates use of 5 U.S.C. 7531 and 7532 procedures when an employee is to be discharged for security reasons.

2. If indeed we accept for the sake of argument that the procedural routes can be considered distinct, NSA mixed the procedural routes in this case. Specifically, a Board of Appraisal, pursuant to 50 U.S.C. 832(b), was established to advise the Director whether or not Respondent was a security risk. That extraordinary security step having been taken, the "distinct procedural path argument" is defeated by the record in this case. The Government concedes 50 U.S.C. 833(a), the Secretary's summary termination authority, was not utilized. The Government's "separate and distinct procedural path" argument cannot adequately explain why a companion section of that same 1964 Act (Sec. 832(b)) was used in this case, which, it alleges, was on a different procedural track.

3. Although there was passing reference to Chapter 370 of the NSA regulations in the notice of termination sent to Respondent, the term "for cause" was never utilized, and the regulatory standard thereunder, "only for

such cause as will promote the efficiency of the service,"[9] was never addressed in any administrative action concerning Respondent's removal.[10] Instead, as pointed out in Argument I.A., *infra*, the terms "clearance not consistent with national interest" and "national security" and "security risk" were repeatedly utilized. Accordingly, by the very language utilized by NSA in its treatment of Respondent, the Solicitor General's argument is defeated.

4. Once the focus of the dismissal is "in the interest of national security," the Secretary of Defense has expressly withheld the power of the Director of NSA to terminate the employee at issue. In discussing the statutory and regulatory framework, the Government brief (p. 2) acknowledges that the National Security Act of 1959 (50 U.S.C. 402 note) gave "the Secretary of Defense, or his designee, the power to establish such positions, and to appoint thereto, without regard to civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency." DoD No. 5100.23 is the operative delegation of authority from the Secretary of Defense to the Director of NSA under the 1959 Act. As set out on page 2 of this brief, "Statutory and Regulatory Framework," Paragraph 10 of said directive expressly withholds authority from the Director of NSA "to terminate the services of an employee in the interest of national security in positions within the NSA, * * *." Accordingly, any inherent authority in a security case stemming from

---

[9] Ch. 370 NSA PMM 30-2, Sec. 1-2 (C.A. App. 66).

[10] As emphasized elsewhere in this brief, the only standard addressed administratively was "whether access to information would be clearly consistent with the national security." (Compare 50 U.S.C. 831 (Pet. App. 32a) with C.A. App. 108 and 191).

the power to appoint is defeated. All of the cases on which the Government relies in its "inherent or implied authority argument" recognize the exception to that rule when there exist express statutory or regulatory provisions to the contrary.[11] Given the regulatory provision to the contrary, the Government's principal argument fails.

5. Again, assuming *arguendo* that "distinct procedural paths" exist, the Government has manipulated the different procedures for its own purposes. The record undisputedly shows that for fourteen years Respondent was an exemplary employee and received "excellent" or "superior" ratings in his job performance. Only when he voluntarily revealed his homosexuality did the Government seek to remove him. Throughout the administrative proceedings and in the District Court, Respondent maintained that sexual preference was not related to job performance and that such a factor was an impermissible reason for termination. Rather than candidly face such an issue with political, civil rights, and constitutional overtones, NSA administratively chose to make this a security clearance case, thus avoiding the sexual preference issue. Had it, in Respondent's view, faced the true reason for dismissal, the Government, arguably, could have proceeded on a "for cause" basis. NSA did not do this, and consequently was "hoist on its own petard" when it made the matter one of national security. As argued above, courts should not allow litigants to flip-flop on legal theories, misleading lower courts and espousing new theories for the first time on appellate review. Similarly, it should

[11] At pp. 15-16 of its brief, the Government acknowledges such "as a general matter, the power to fire is, *unless expressly circumscribed*, inherent in the power to hire." (Emphasis added.) E.g., see *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

be beneath the dignity of the Government to elect one method of termination only to thereafter disavow that election when the employee successfully asserts hearing rights given him by Congress. In *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, 545-46 (1959), this Court disallowed an amazingly similar Government disavowal of its procedural protections in a security case. It should do so again.[12]

6. The Government's inherent authority argument in favor of a termination power in the Director of NSA pursuant to Chapter 370 of its regulations is totally dependent on the 1959 Act establishing NSA (50 U.S.C. 402 note). However, Congressional legislation subsequently enacted proves this argument erroneous. In 1964, Congress passed 50 U.S.C. 833 (the summary termination authority of the Secretary of Defense). This 1964 Act expressly recognized that it was dispensing with the existing requirement of procedures (and hearing) pursuant to 5 U.S.C. 7532 by utilization of the following language:

[12] The concern, at the conclusion of the Government's brief (p. 40) that mandatory 7532 procedures in security cases will enmesh the courts in disputes over whether a removal was or was not on national security grounds is easily cured by an accurate and candid formal notice, either including or excluding national security as the basis of personnel action. Thereby any possible ambiguity would be eliminated. This will not only clarify the proceedings for the purpose of determining whether Section 7532 is applicable, but will also protect the employee against the stigma of having been discharged on national security grounds.

In any event, the possibility that there may be some doubt in this regard in other cases provides no justification for giving Section 7532 less than its congressionally intended effect in those cases in which the agency specifies that "national security" is a basis on which discharge is sought.

> (N)otwithstanding Section ( ) . . . 7532 of Title 5 . . ., the Secretary may terminate the employment of any (NSA) officer or employee . . . whenever . . . he determines that the procedures prescribed (therein) . . . cannot be invoked consistently with the national security. 50 U.S.C. 833.

Had Congress felt that a 7532 hearing was not previously required by law, it would not have used this language. It is thus clear that the 7532 procedures govern (absent invocation of Sec. 833, which requires a finding by the Secretary of Defense that all other procedures are "not consistent with national security").[13]

To the same effect is Section 832(b) of 50 U.S.C., which establishes Boards of Appraisal. In that Section, Congress made it clear that "appraisal by such a board is not required before action may be taken under section ( ) . . . 7532 . . ." Accordingly, Congress again expressly recognized the prior 7532 hearing requirement. Thus, there exist not one but two examples in subsequent legislation expressly recognizing 7532 procedures. This Congressional recognition is patently inconsistent with the Government's position that the 1959 NSA Act somehow did away with Section 7532 termination procedures.

The National Security Act of 1950 contained the requirement of a hearing when the Department of Defense attempts termination in the interest of national security. The 1959 NSA Act nowhere expressly adverts to termination authority. Accordingly, the Government must argue a repeal of the express requirements of 7532 by implication stemming from the power to appoint. As the Court of Appeals pointed out, such a repeal by implication is not favored by the courts. Indeed, the very

[13] There, of course, was no such invocation or finding in this case.

existence of DoD Directive 5100.23 (May 1967), Subsec. 10, or NSA/PMM Chapter 371.1 (July 1976) evidences that even Petitioners did not consider such a repeal by implication to have taken place. Accordingly, the Department of Defense and NSA, by formal promulgation of regulations, disavow the Government's position in this case.

7. The legislative history of 7532 clearly addresses the mandatory nature of the right to an appeal and a hearing available to Department of Defense employees. Whereas 5 U.S.C. 7532 expressly indicated there was to be no change in pre-existing dismissal authority at the Atomic Energy Commission (5 U.S.C. 7533), H.R. Rep. No. 2330, 81st Cong., 2d Sess. 3 (1950) states as follows:

> Under the present law, with respect to (Department of State and Defense), the officer or employee who is suspended or terminated as a security risk is not entitled, as a matter of right, to an appeal to the head of the agency concerned. *This legislation extends this appeal to employees (of these agencies).* (Emphasis added.)

Congress thus intended that 7532 procedures were mandatory in "security risk" cases and not merely a distinct procedural option available to the Department. Acceptance of the Government's argument here is intolerable in that it would subvert the application of any 7532 rights of all non-veteran excepted service employees in government in every instance at the whim of the Director of the NSA or other respective Government official. If the Petitioners "for cause" arguments are accepted, there will never be an instance at NSA where a 7532 hearing takes place. Since a security clearance is a prerequisite to NSA employment, a mere recitation of Ch. 370 for cause termination procedures (rather than Ch. 371 - national secur-

ity) in the notice of termination will effect an end run around the clear Congressional dictates of Section 7532.

8. Petitioners' brief (pp. 27-31) cites other legislative history, arguing that Section 7532 was intended (a) to give agency heads the power to take immediate personnel action; (b) to be used sparingly and in exceptional cases; and (c) "to *increase* the authority of heads of Government departments" and not "to provide" protections for "employees who do not otherwise have statutory tenure . . ."

In response it is initially necessary to point out that courts need not and should not turn to legislative history if the meaning of legislation can be gleaned from the face of the statute. *Caminetti* v. *United States*, 242 U.S. 470, 490 (1917); *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929); *Wilbur* v. *United States*, 284 U.S. 231, 237 (1931); *Long* v. *Stenson*, 465 U.S. 886, 896 (1983). As shown above, a hearing by an agency authority, duly constituted for the purpose, is plainly required in national security cases. There is no need to turn to the oft confusing legislative histories of the statutes at issue here.

If this Court, however, feels that extensive legislative history must be examined, the following four considerations of Congress, all favoring Respondent's position here, preponderate:

(i) *Congress thought the 7532 hearing right would be accorded all employees accused of being security risks.* Senate Report No. 2158, 81st Cong., 2d Sess. (1950), p. 2, states:

> The purpose of the bill is to increase the authorities of the heads of government departments engaged in sensitive activities to summarily suspend employees considered bad security risks. * * *

There is no indication that the rights of an employee in this bill were for exceptional circumstances or not to apply across the broad. Also see H. R. Rep. No. 2330, 81st Cong., 2d Sess. (1950) quoted *infra* at pp. 22-23. Also see hearings before the Committee on Post Office and Civil Service, H. R., 81st Cong., 2d Sess. H. R. 7439 (U.S. Sup. Ct. Lib. Index Ref. 6794). On page 11, the question was raised as to whether the proposed rights extended to protect employees in the excepted service or "unclassified employees." The answer was a definite "yes." At this hearing, Capt. McDill testified on behalf of the Department of Navy and Department of Army. Some of Congressman Karst's questions and Capt. McDill's answers are on page 21 as follows:

> * * * I take it that you would have a choice, if you're going to use it or not use it; is that what you thought?
>
> *CAPT. McDILL.* No, sir; but it applies more particularly to the individual who has access to classified material, who is in a position to obtain it, and through deterioration of habits, or unrevealed characteristics at the time of his employment, is addicted to dropping the news or dropping the information around.
>
> *MR. KARST.* In otherwords, if this law passed, you would not have a choice of using one procedure or another, and you would not proceed with this law right on down; you do not have a choice, do you?
>
> *CAPT. McDILL.* No, sir; not in the case of clear security risks. We would use this law, and do use it; * * *

The debates in the Congressional Record of the 81st Cong., 2d Sess., provide similar indications of the absolute right to appeal in these circumstances. See comment of Congressman Rees at 96 Cong. Rec., p. 9618:

> During the hearings on this legislation, certain witnesses stated that the legislation should contain provisions providing for an adequate appeal to make certain that no civilian employee is dismissed arbitrarily without sufficient evidence that such employee is a security risk.
>
> These views were taken into consideration and the bill provides the following rights for employees who are suspended as security risks, but before their termination.

Thereafter, the Congressman listed the employee rights at issue here. At 96 Cong. Rec. 10016, Congressman Murray of Tennessee listed the hearing and rights to review by the head of the department and said they applied to "*any* suspended employee" who was to be terminated.

Congressman McCarthy stressed that employees' rights should be recognized. At Cong. Rec. 10027, he stated:

> It is very clear to me that no citizen has the right to say, "You must give me a Federal job" when no job exists, but when a man does take a Federal job, when he serves in it faithfully and loyally and over a period of time according to the Civil Service regulations, he does possess certain rights, and I think that the Congress should recognize the existence of those rights as its moral responsibility to sustain them.[14]

---

[14] In addition, with reference to the 1964 Act, 50 U.S.C 831-835, Congress later gave summary termination authority to the Secretary of Defense with respect to NSA security risks. In H.R. No. 108, 88th Cong., 1st Sess., pp. 4 and 5, the proposed new extraordinary authority is referred to in the following context:

> (T)his authority shall be exercised only upon a determination by the Secretary of Defense that the normal removal procedures involving *appeal rights* cannot be applied consistently to national security. * * * (Emphasis supplied.)

In the congressional debate on H. R. 334 (the 1964 Act), 109 Cong. Rec., 8132, Congressman Johansen stated:

> It does not alter the fact that NSA is part of the Department of Defense, is generally subject to overall Defense Department regulations controlling dismissal of employees and is also generally subject to Executive Order 10450, the security directive issued by President Eisenhower which provides for notification, *hearing*, right of counsel, and so forth, for an accused employee. *This is and under H. R. 950 will continue to be the procedure normally followed by NSA in terminating employment of personnel adjudged to be security risks.* (Emphasis added.)

(ii) *Unintentional minor indiscretions as opposed to disloyalty were intended to trigger 7532 procedures.* In the hearings before the Senate Committee on Armed Services 81st Cong., 2d Sess. on H. R. 7439, this distinction was made manifest. Mr. Larkin of the Department of Defense said, at page 8:

> (B)ut some of those employees, while loyal or while there is no proof that they are disloyal, are of such characteristics or of such personal traits that it is dangerous for them to work in the sensitive job.
>
> So that what we try to do is if we find a person, we have no proof that he is disloyal—
>
> *SENATOR BRIDGES*. People like a drunkard or a sexual pervert?
>
> *THE CHAIRMAN*. Or a person who talks and talks and talks.
>
> *MR. LARKIN*. Or a person who associates with persons who belong to the Communist Party or any of the agencies on the Attorney General's list, but against whom there is no proof he is a Communist as such himself but who by virtue of his continual association becomes a tremendous risk for us to keep in a sensitive job where he is continually every day getting highly classified material.

And see H. R. No. 2330, 81st Cong., 2d Sess., p. 3:

> When an employee has committed an indiscretion or his pattern of conduct or personal habits leads to the conclusion that he is likely to be a poor security risk, the responsibility for deciding and taking the proper action rests with that Secretary.

See Senate Report 2158, 81st Cong., 2d Sess., p. 2:

> This bill is concerned primarily with the problem of dealing with those Federal employees who, although loyal, are so careless as to jeopardize the national security.

See Senate Report 1155, 80th Cong., 2d Sess. 2 (1948) on the previous proposals for the legislation containing Section 7532 (eventually passed in 1950) under "Explanation of Amendments," the following language appears:

> According to testimony developed in the hearings, all the agencies feel that they can and will handle loyalty questions under the Executive Order, and that this bill will primarily cover cases of indiscreet employees who are a bad security risk.

It was also apparent from the Hearings before the Committee on Post Office and Civil Service on H. R. 7439, *supra*, that indiscretions, as opposed to treason or disloyalty, were the primary object of the 1950 legislation. At page 4, there appears a discussion of the problem in the law existing at that time that was sought to be remedied:

> There is no provision contained therein whereby a person may be removed who on the one hand is absolutely loyal, but on the other hand is dangerously indiscreet. The indiscretion of a loyal employee can result in just as complete and damaging a compromise to national security as the actions of a disloyal employee.

To the same effect, see page 71 of that same report and 96 Cong. Rec. 10025, statement of Congressman Corbett.

(iii) *Review by the agency head was intended as an integral employee right and was a crucial compromise to avoid outside Civil Service Commission review.* A review of H. R. Rep. No. 2264 and S. Rep. No. 1155 of the 80th Cong., 2d Sess. (1948) shows a vigorous debate as to whether or not an employee about to be terminated as a security risk would have an independent review by an outside board such as the Civil Service Commission. This debate was carried to the 81st Cong. and vigorous opinions were expressed. See generally 96 Cong. Rec., 10015-10034. Amendments espousing outside review were unsuccessful. However, the certainty of an appeal to the agency head was argued to be an effective compromise between the rights of the employee and the interests of national security.[15]

Congressional concern is exemplified by the statement of Congressman Holifield, *Id.* 10021:

> What are you doing here? You're widening the field for discharging an employee, to include a vague term called a "security risk," not disloyalty, but a security risk. Now, what is a security risk? Well, the Undersecretary of Navy, Mr. Kimball, said it might be due to a person's associations, to his affiliations, to his habits or to some indiscreetness.
>
> Who is going to judge whether a man's habits are good or bad? Who is going to judge whether a man is

---

[15] See, e.g., comments of Congressman Hagen, 96th Cong. Rec. 10018 as to repeated attempts at amendment in this regard. Also see comments of Congressman Miller of California, at 10020, and see p. 10023, proposed amendment of Mr. Miller.

discreet or not? What are the standards of that judgment?

> So here in effect you give to the head of the agency or his subordinates the right to fire an individual for security risk reasons without giving that man an appeal. It says in the bill that he has an appeal, but he can only appeal to the head of the agency which fires him. I submit that is not the proper kind of an impartial appeal that a man needs if his job is being taken away from him.

The concerns of these congressmen was assuaged by the assurance that the agency head could provide a proper review (96 Cong. Rec. 10032):

> *MR. CANFIELD.* I wonder if the gentleman would be good enough to tell us who, under the bill unamended will be the final arbiter in the Department of State as to the dismissal of these employees?
>
> *MR. CHELF.* As I have said, we have to trust our elected or selected administrators of our Government agencies. However, we ought to here and now serve notice upon each and all of them that the Congress not only expects but demands that its will be done and that this and all other laws, especially pertaining to this Nation's security, are strictly enforced to the letter, because at the moment the very lives of our GI's in Korea are at stake.
>
> No honest, loyal, patriotic Federal employee has any need to worry about this legislation. * * *[16]

[16] The debate of the 1964 Act, providing for Secretary of Defense summary termination at NSA, reveals that Congress clearly believed that there was an existing right to appeal to the head of the agency under the 1950 legislation. See the comments of Mr. Lindsay, 109 Cong. Rec., p. 8141:

> (Mr. Alger) has put his finger on it when the gentleman talks about central power and the dangers of central power. When you collect this amount of arbitrary power with no review, no hearing, no check, no appeal, then you have got something to be afraid of. I would urge the gentleman from Texas, however, to support this amendment that is now pending. That amendment seeks only to reinstate the hearing procedures contained in Title V of United States Code. These procedures do not require direct confrontation. The Government does not have to give up any secrets. Title V of the Code provides that when an employee receives notice of dismissal, he has right to a written statement summarizing the charge. He has an opportunity to reply in writing within thirty days, and he is given a hearing. He has a right to appeal to the head of the agency.
>
> Mr. Chairman, the gentleman from Texas (Mr. Alger) asked that there be a review board. There is already a provision in Title V that there be a review by the Agency head. This is all that we ask. Is it too much to ask for minimum due process in this regard? * * *

(iv) *The political accountability of the agency head was intended to insure fairness and independence in the appeal process.* In the Hearings before the Senate Committee on Armed Services on H.R. 7439, *supra*, Mr. Larkin, the representative of the Secretary of Defense, answered the Senators' concerns about the exercise of arbitrary and capricious powers in terminating so-called "security risks" (at page 20) as follows:

> You give him full responsibility as Chief Executive of his department, a Presidential nominee, confirmed by the Senate. You give him full responsibility for preserving the integrity of the confidential information in the department, and he has to have some kind of authority to fulfill that responsibility.

And then, at page 21:

And see 109 Cong. Rec. 8142:

> *MR. ASHLEY.* . . . I would like especially to commend the gentleman from New York (Mr. Lindsay) for making it clear that under existing law a security risk can be dismissed but still have appeal and review rights which in no way jeopardize national security. What Section 303 does in the bill under consideration is to strip those rights of appeal and review. * * *

> Now before he is terminated, the Secretary of Defense himself must take the action. * * *

In S. Rep. No. 2158, 81st Cong., 2d Sess. (reported in 1950 U.S. Code, Cong. Serv. 3278 at 3280), the non-delegability of termination power was emphasized as follows:

> It is the intention that the head of a department can delegate his authority to suspend an employee but he cannot delegate his power to terminate the services of an employee. * * *

In the hearings before the Committee on Post Office and Civil Service, H. R. 81st Cong., *supra*, the following took place at page 47:

> *MR. MILLER*. Would the right to such an appeal or the knowledge of such an appeal existing be a deterrent to the frivolous use of this authority by people in the agencies? Do you not think that is true?
>
> *MR. WALTERS*. Definitely. * * *

Similarly, in the House hearings before the Committee on Post Office and Civil Service on H. R. 7439, *supra*, Capt. McDill, the representative of the Departments of Navy and Army testified at page 21 as follows:

> I understand your question, Mr. Miller, to be addressed to the so-called spite case. Yes sir, in my opinion, the bill does provide adequate protection, because we have an agency head appeal, and it would be very difficult to bring up to the agency head false, fraudulent, or spurious testimony based on spite.
>
> * * *
>
> *CAPT. McDILL*. Knowing that the procedure exists, I should think that anyone addicted to spiteful testimony or spiteful habits would be reluctant to proceed if we had to justify them before the agency head.

Again, in the debate on the 1950 Act, the protections in 7532 were emphasized as adequate. See the comments of Congressman Kilday, 96 Cong. Rec. 10026:

> Now, you are talking about an appeal. There is an appeal provided to the head of the agency. That means a man in the Department of the Army could go to the Secretary of the Army, a man in the Navy, to the Secretary of the Navy, and in the Air Force to the Secretary of the Air Force, and so on. Do you not regard that as considerable protection? You grant to those officers powers far broader than these. They have today the actual decision for the drafting of men into the service. Of course, it comes in the name of the President when it is invoked, but when the quotas come up they come from these Secretaries. So you are going to say that the man who has the power to say that the sons of American parents shall go into the service, shall go into combat, is not to be trusted in passing upon whether a man is a poor security risk. You have granted him those additional powers, and I do not see why you would hesitate to say that appeal to him is not proper protection.
>
> The gentleman from California (Mr. Miller) stated that at the lower levels they were subjected to vindictive and capricious actions; but when you get to the higher levels, when you get to Washington, when you get all the way up to the top of the department you appeal to a man who has far greater powers than those in the lower levels. He certainly would not act capriciously with the individual involved. Why should you worry about giving him this additional jurisdiction?

At 96 Cong. Rec. 10028, Congressman Thornberry stated:

> Let us have confidence. We have to trust somebody. Let us trust the Secretary of National Defense and the Secretary of the Army and the Navy and the Air

> Force and the Head of the Atomic Energy Commission, and at least say to them, "We are taking the chance that you will deal justly with these poor security risks in behalf of the American boys who are now going out to die on foreign soil." Let us not be tying the arms of men behind their backs by trying to make it easy for poor security risks.

At the same page of the Congressional Record, Congressman Murray appealed to the House to vote down the amendments calling for Civil Service Commission review by stating as follows:

> Are we going to say to the Secretary of War and the Secretary of the Navy, and the Secretary of the Air Force, "Well, it is true that you have given this employee a fair hearing. It is true you have passed carefully upon the charges. It is true that you have found the employee to be a bad security risk, and yet you must go before the Civil Service Commission so that that Commission can substitute its judgment for your judgment as to who is or is not a bad security risk.
>
> Do you not have enough confidence in the Secretary of Defense and the Secretary of the Army and the Secretary of the Navy and these other defense heads to let them pass finally on these security risks? * * *
>
> I appeal to you to vote down these amendments.

96 Cong. Rec. 10029:

> *MR. MURRAY.* * * * I take my stand with the heads of our defense agencies and I am willing to trust the good judgment of our Secretary of Defense - Navy and Army - and other defense heads about discharging these poor security risks. * * *

B. *Egan* v. *Department Of Navy* Does Not Control This Case And Is Distinguishable.

Egan v. *Department of Navy,* No. 86-1552 (U. S. Supreme Court, Feb. 23, 1988) and the lower court decisions in that case (28 M.S.P.R. 509 (1985), *rev'd* 802 F.2d 1563 (Fed. Cir. 1986)) are repeatedly cited in the Government's brief as authority that 7532 should not be mandatory. For several reasons, *Egan* does not control and is distinguishable:

1. Footnote 7 in *Egan* clearly indicates that this Court did not decide the issue in this case: "This court will meet the issue in *Doe* when it comes to it." The footnote went on to say that *Egan* was decided "on the parties' assumption that Section 7513 was available to the Navy in this case and then it proceeded thereunder." (Slip Op. 13.)

2. In *Egan*, there was never an argument made that Section 7532 was directly applicable. Rather, as indicated at Slip Op. 13, the employee attempted only to draw an inference by arguing that, if no substantive review of the security clearance denial could be available at a 7513 hearing, Section 7532 would constitute a compelling "anomaly" by giving the employee more protections than Sec. 7513. Rejecting this argument, the Court indicated it did not accept its lynchpin, that Petitioner had more procedural rights under Section 7532. Thus only tangential attention was paid to 7532 by this Court and *Egan* does not represent any direct holding on applicability of 7532.

3. The major distinguishing factor was that *Egan* never attained unconditional employment with the Department of the Navy. He was a "new hire" and it is clear from the facts that at all times his obtaining a secur-

ity clearance was a "condition precedent" to employment. Accordingly, although he did work for a period of time, he never fully complied with the prerequisites of his position, and as the opinion points out, he performed "only limited duties and was not permitted to board any submarine." (Slip Op. 2.)

Egan's status is thus clearly distinguishable from Respondent's employment status here. (See 5 U.S.C. 7532(c)(1) and (2).) Doe promptly obtained his security clearance and was employed with NSA for a period of sixteen years with overall rating of "Excellent" for the years 1978-1980 and "Outstanding" for 1981 (C.A. App. 6-7 and 16-17). Egan never obtained full employment status, and it is understandable that even his own counsel assumed that "termination" or "removal" under Section 7532 was not applicable since he never obtained his security clearance. Obviously quite a different situation exists with an employee who has been cleared for over fourteen years before there is the first thought of an allegation that his continued employment is not consistent with the interests of national security.

4. Egan was a Veterans Preference Eligible and thus had appeal rights to the Merit Systems Protection Board under 5 U.S.C. 7513(d). Respondent, a non-veteran in the excepted service, had no right to independent review other than Section 7532. In never seeking a Section 7532 review, Egan obviously considered the MSPB his only avenue of appeal. The case did not purport to consider the right to agency review under 7532 of a non-veteran in the excepted service.

5. Finally, the Petitioner's brief citing *Egan* argues repeatedly that one in Respondent's position at NSA receives fewer procedural protections under Section 7532

than under Chapter 370 of NSA's regulations. While the *Egan* majority's view that an MSPB hearing gave more protections than 7532 may have had logical significance in rejecting the employee's arguments based on inference in that case, Respondent respectfully submits that whether NSA regulations give more or less protection than 7532, such can logically have no bearing on whether or not Congress mandated a 7532 hearing for security terminations. There is nothing in the language of 7532 to suggest that employees' entitlements thereunder are contingent upon the existence of other agency regulations, *vel non*.

Indeed, Respondent views a 7532 hearing at the Secretary of Defense level as providing a desirable independent review of the propriety of his termination.[17] His treatment at the hands of the Board of Appraisal and the Director of NSA in this case was in his view procedurally unfair. After a favorable psychiatric report, the Board succeeded in obtaining an adverse report from the same psychiatrist without re-examination of Respondent. (Compare C. A. App. 102-105 with C. A. App. 109-117.) Having been served with notice of removal based on specific acts (C.A. App. 82-84), Respondent litigated administratively, and apparently convinced the Director that the acts charged were an insignificant security risk. This was to no avail since the Director removed him on the basis of his overall lifestyle—a cause for termination with respect to which he had no notice. (C. A. App. 192, Para. d.)[18] In Respondent's view, such obvious unfairness would

---

[17] This would provide for a review of the substantive basis for denial of security clearance, thus avoiding the basic problem of a security review outside the Department of Defense that was the major concern in *Egan*.

[18] See page 7 of the Statement of Facts in this brief, the crucial paragraph "d" of the Director's decision.

be remedied at a Department of Defense hearing and review by the politically responsible head of the agency who is accountable to the President and Congress.

The "less protection under Section 7532 argument" was rejected by three members of this Court in *Egan*. See dissenting opinion of Justice White joined in by Justices Brennan and Marshall. As indicated in footnote 2 of that dissent, Section 7532 is not "harsh and drastic." One terminated thereunder may be re-hired "in the discretion of the head of the agency concerned" and the Secretary of Defense need not act "personally" since he may finally review discharge decisions through a "designee." Section 7532(c)(3)(D).

Finally, as a long-range theoretical matter, to hold that the statutory hearing right under 7532 is inapplicable because of the existence of NSA Ch. 370 termination regulations, is to relegate all security case procedural protections to the will of the Director of NSA. Presumably, in the future, he can revoke his own regulations and leave non-veteran excepted service employees with no procedural rights at all. Absent the repeal of Section 7532, Congress cannot be deemed to intend such a result.

III. PLAINTIFF WAS IMPROPERLY DEPRIVED OF PROCEDURAL PROTECTIONS AFFORDED BY INTERNAL REGULATIONS OF THE DEPARTMENT OF DEFENSE AND NSA.

The Petitioners argue that an employee of the National Security Agency, who fails to maintain a required clearance for access to classified information, may be removed "for cause," without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833. Insofar as NSA purported to use the provisions of Chapter 370 of its Personnel Management Manual to effectuate Respondent's removal (C.A.App. 82), the

question arises whether Chapter 370 can be used to masquerade what is really a dismissal in the interest of national security.

Petitioners' "for cause" argument (Br. 18-22) relies heavily on the statutory standard Congress established in 50 U.S.C. 831. Their brief in this Court (p. 19) reads:

> Clearance for access to SCI is a continuing requirement for employment at NSA. Section 831 provides that "no person shall be employed in *** the National Security Agency *** *or continue to be so employed* *** (or) have access to any classified information ( ) unless such employment *** or access to classified information is clearly consistent with the national security." ***

Chapter 370 should not be used to carry out a removal under the aforesaid statutory standard, which clearly involves the national security. Chapter 370 does not provide for implementation of the statutory requirements of 50 U.S.C. 831, *et seq*. Section 3-2 of Chapter 370 expressly excludes the statutory standard of 50 U.S.C. 831, *et seq*. by stating that it does not apply to "a suspension or removal taken in the interest of national security" (Pet. App. 38a).

We submit further that the aforesaid standard provided by Congress is clearly implemented in another NSA regulation promulgated, but not followed by NSA in the removal of Respondent, in Chapter 371 of the NSA Personnel Management Manual 30-2. (Opp. App. 9b-15b). The title page of Ch. 371 and Section 1-1 states that

> This chapter prescribes policies and procedures governing actions to limit access to classified information, suspend and/or terminate civilian personnel of the National Security Agency for reasons of national security . . . .

Section 1-2 provides that the regulations in Chapter 371 are "in accordance with, and pursuant to, the authority and requirements" of P.L. 88-290, which is codified at 50 U.S.C 831 and, as shown above, contains the very statutory standard Petitioners erroneously seek to use as "for cause" under Chapter 370. Chapter 371 contains the identical language of the statutory standard in its Section 1-3.a; but 370 has not a word about it. Nor does 370 provide for the use of Boards of Appraisal pursuant to 50 U.S.C 832; but 371 does provide for such Boards of Appraisal at Sections 1-3.b.(3) and 1-5. In addition, Chapter 371 implements the requirements of 5 U.S.C. 7532. (See 371.1-2.a; C.A. App. 228.)

In view of the foregoing, we submit that, in proceeding under Chapter 370 rather than Chapter 371 of its personnel regulations, NSA did not adhere to its own regulations and deprived Respondent of important procedural rights guaranteed by previous decisions of this Court) (*Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v.*Dulles*, 354 U.S. 363 (1957)) and due process rights guaranteed by the Constitution (*Greene* v. *McElroy*, 360 U.S. 474, 507-508 (1959)).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

JOHN G. GILL, JR.
Gill & Sippel
358 Hungerford Court
Rockville, Maryland 20850
(301) 251-9200

LEONARD P. BIENVENU
51 Monroe Street, Suite 1401
Rockville, Maryland 20850
(301) 424-1011

Attorneys for Respondent

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-751

In the Supreme Court of the United States

OCTOBER TERM, 1988

FRANK C. CARLUCCI,
SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985)	11
Cole v. *Young*, 351 U.S. 536 (1956)	5, 10
Department of Navy v. *Egan*, No. 86-1552 (Feb. 23, 1988)	10
United States v. *Fausto*, No. 86-595 (Jan. 25, 1988)	12
Vitarelli v. *Seaton*, 359 U.S. 535 (1959)	6, 7
Webster v. *Doe*, No. 86-1294 (June 15, 1988)	12
Statutes and regulation:	
5 U S.C. 7512	9
5 U.S C. 7532	*passim*
5 U.S.C. 7532(c) (3) (C)	8
5 U.S.C. 7532(c) (3) (E)	8
50 U.S.C. 403(c)	12
50 U.S.C. 831	4
50 U.S C. 832(b)	9
50 U.S.C. 833	9
50 U.S.C. 833(a)	1, 2, 9
Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 comp.)	4, 6, 7
§ 6, 3 C.F.R. 937-938	5
Miscellaneous:	
DoD Directive No. 5100.23 (May 17, 1967)	4, 5
53 Fed. Reg. 26023 (1988)	6
Hearing on S. 1561 and S. 1570 Before a Subcomm. of the Senate Comm. on Armed Services, 80th Cong., 2d Sess. (1948)	8
National Security Agency Personnel Management Manual 30-2 (Aug. 12, 1980)	4, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-751

FRANK C. CARLUCCI,
SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondent's basic position in this case is deeply ironic. By contending that 5 U.S.C. 7532 and 50 U.S.C. 833(a) constitute the exclusive statutory procedures for removing a federal employee for national security reasons, respondent would relegate federal employees to procedures affording *less* protection than they receive under ordinary "for cause" removal provisions. Respondent never explains why this result would be in the interests of federal employees—other than those in the unique position of having already received a "for cause" hearing. Nor does respondent explain why this result would be in the interests of federal agencies, which must involve

the agency head directly in removals taken under the emergency procedures of Section 7532 and Section 833(a).

Respondent's position would not only disadvantage both federal employees and federal agencies, it finds no support in either the language or history of the relevant statutory provisions. Sections 7532 and 833(a) were enacted to enable agencies to bypass statutory and other protections of employees where national security considerations require; they are not exclusive procedures for removing on security grounds someone who could otherwise be removed pursuant to NSA regulations governing "for cause" removals. Thus, they do not circumscribe the authority of the Director of NSA to remove an employee for cause where the cause is related to national security.

1. Respondent makes two preliminary arguments designed to pretermit the question on which this Court granted certiorari. Ultimately, however, both arguments *presuppose* the correctness of respondent's position that Sections 7532 and 833(a) constitute the exclusive source of authority to remove an employee for national security reasons. As such, respondent's preliminary arguments merely beg the question presented for this Court's review.

a. First, respondent asserts (Br. 12-17) that NSA may not rely on its "for cause" removal provisions, even if it had the authority to do so, because NSA never invoked its "for cause" removal procedures in this case. That claim is incorrect, as we demonstrate in our opening brief (at 22-24). Respondent received a "notice of proposed action to remove you * * * in accordance with the provisions of NSA/CSS Personnel Management Manual (PMM) 30-2, Chapter 370" (C.A. App. 82). Chapter 370 sets forth in Section 3 (Pet. App. 38a-43a) the standards and procedures for removing an employee and specifically provides that an employee may be removed pursuant to that section only for "such cause as will promote the efficiency of the service" (*id.* at 39a). NSA expressly relied upon that removal authority (and no other) and fully complied with its procedures governing "for cause" removals (see Pet. Br. 23-24; Pet. App. 19a).[1]

[1] Respondent contends (Br. 18-19 & n.10) that the administrative proceedings focused only on whether his continued access to SCI was clearly consistent with the national security, not on whether loss of a security clearance constituted cause for his removal. But the notice of proposed removal clearly drew the connection between the two: "I am unable to find that your continued access to sensitive compartmented information is clearly consistent with the national security. You fail to meet the statutory standards for employment in a critical and sensitive position that requires access to highly classified information. *Therefore,* I am proposing that you be removed from your position with the National Security Agency." C.A. App. 83 (emphasis added). In light of the fact that continued clearance for access to SCI is a statutory requirement of employment at NSA, no more detailed discussion of the "cause" for respondent's removal was necessary. Once it was determined that his clearance had to be revoked, there was nothing left to "address[] administratively" (Resp. Br. 19 n.10).

Respondent's related contention (Br. 16-17) that we did not argue in the lower courts that respondent was removed pursuant to NSA's "for cause" regulations is simply baffling. The authority of NSA to dismiss employees pursuant to Chapter 370 where the cause for removal is related to national security has been the focal point of this litigation from its inception. See, *e.g.*, C.A. App. 24-25 (Defendant's Statement of Material Facts as to Which There is No Genuine Issue); Appellees' Br. 6-7; 37; 47-48. It was also the question expressly decided by the district court (see Pet. App. 19a-20a) and, albeit without citing the applicable "for cause" regulations, by the court of appeals (*id.* at 10a).

The "cause" for respondent's removal was, of course, related to national security: clearance for access to sensitive compartmented information (SCI) is a continuing statutory requirement for employment at NSA, and the determination that respondent's access to SCI was no longer "clearly consistent with the national security" (50 U.S.C. 831) therefore required respondent's removal. But respondent's assumption that NSA cannot have properly invoked its "for cause" removal procedures, because the cause for removal involved national security, simply assumes, without proving, that Section 7532 establishes the exclusive mechanism for removing NSA employees on grounds related to national security.

b. Respondent also argues that even if Section 7532 is not, by its own terms, an exclusive mechanism for removing employees for reasons related to national security, it has been rendered the exclusive mechanism for any such removals of NSA employees by various nonstatutory sources that require such removals to be made pursuant to Section 7532. Respondent cites (at 18-20, 38-40) three nonstatutory sources that allegedly limit the authority of the Director of NSA in this way: Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 comp.), DoD Directive No. 5100.23 (May 17, 1967), and Chapter 371 of *NSA Personnel Management Manual 30-2* (Aug. 12, 1980). None of these sources, however, has the desired effect.

Executive Order No. 10,450 merely implements and extends to the heads of all agencies the summary suspension and termination authority granted by the predecessor of Section 7532 (see Pet. Br. 5 n.4). It does not mandate that that authority, and no other, be used in all removals relating to national security.

To the contrary, it provides that the head of an agency shall use this authority to suspend and remove an employee "if he deems such suspension necessary in the interests of the national security" and further "determine[s] such termination necessary or advisable in accordance with [Section 7532]." Exec. Order No. 10,450, § 6, 3 C.F.R. 937-938 (1949-1953 comp.). As this Court stated in *Cole* v. *Young*, 351 U.S. 536, 543-544 (1956), employees may be dismissed for cause based on doubts about their loyalty without invoking the summary removal authority implemented in Exec. Order No. 10,450. Indeed, the Court in that case stressed (351 U.S. at 546) that "[i]n the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears." See Pet. Br. 36.

In DoD Directive 5100.23 (C.A. App. 60-65), the Secretary of Defense delegated his appointment and removal authority under the 1959 NSA Act to the Director of NSA. The Secretary of Defense, however, reserved to himself certain specific statutory removal authorities, including the summary dismissal power granted by 5 U.S.C. 7532.[2] But the Secre-

[2] The Director of NSA was delegated the authority to "[a]uthorize the suspension, but not to terminate the services of an employee in the interests of national security in positions within the NSA, *in accordance with the provisions of 5 U.S.C. * * * 7532, [and] Executive Order 10450*" (DoD Directive 5100.23 ¶ 10 (emphasis added)). Respondent quotes (Br. 19) this provision, but omits the italicized language, which clearly indicates that only the summary termination authority in Section 7532 has been withheld, not all authority to terminate employees for reasons relating to national security. The President has recently designated NSA an agency within the meaning of Section 7532 and thus

tary did not impose any limitation on the Director's authority to remove employees for "cause" whenever the cause is related to national security. That inference would follow, again, only if one accepted respondent's principal argument that Section 7532 is the exclusive mechanism for such removals.

Similarly, Chapter 371 of *NSA Personnel Management Manual 30-2* (PMM 30-2) prescribes policies and procedures for all suspensions and terminations pursuant to Section 7532 and Exec. Order No. 10,450. See PMM 30-2, ch. 371.1-2(a) and (b). Thus, unless Section 7532 is an exclusive mechanism for removals related to national security, NSA is not precluded by Chapter 371 from removing for cause under Chapter 370 an employee who loses a security clearance required by his position.

For the same reason, respondent is wrong in contending (Br. 40) that "in proceeding under Chapter 370 rather than Chapter 371 of its personnel regulations, NSA did not adhere to its own regulations," and his reliance on this Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), is therefore misplaced. In *Vitarelli*, the Secretary of the Department of the Interior had established procedural safeguards governing all security discharges. The Secretary sent a notice of dismissal to employee Vitarelli citing those regulations, as well as Exec. Order No. 10,450 and the predecessor of Section 7532 as the basis for the dismissal. The agency, however, then failed to afford Vitarelli the procedural rights guaranteed by its own regulations. The Court accordingly held that "such dismissal was illegal and

---

granted to the Director of NSA the summary termination authority in Section 7532. 53 Fed. Reg. 26023 (1988).

of no effect" (359 U.S. at 545) because the secretary "was bound by the regulations which he himself had promulgated" (*id.* at 540). The Court noted (*id.* at 539) that even though Vitarelli was in the excepted service and thus could have been "discharge[d] summarily * * * without the giving of any reason," the Secretary relied on his regulations governing security discharges and thus "was obligated to conform to the procedural standards he had formulated * * * for the dismissal of employees on security grounds."

In the instant case, by contrast, NSA never purported to rely on Chapter 371, or Exec. Order No. 10,450, or Section 7532 in discharging respondent. To the contrary, NSA repeatedly informed respondent that his discharge was pursuant to the "for cause" procedures set forth in Chapter 370. Whether NSA was permitted to proceed under Chapter 370 in light of the fact that the cause for respondent's removal was related to national security is, of course, the question presented for review. But Chapter 371, which merely implements Section 7532, does not answer that question. Only if Section 7532 itself circumscribes the authority of NSA to dismiss employees for cause would the procedures of Chapter 371—which do not, in any event, go beyond those already required by Section 7532 (see PMM 30-2, ch. 370.3)—be required in this case.

2. On the merits of the question presented, respondent contends (Br. 22-23) that to permit the Director of NSA to dismiss an employee for cause where the cause for the dismissal is related to national security would constitute a "repeal by implication" of the "express requirements" of Section 7532. Respondent, however, simply ignores the per-

missive language of Section 7532, which states that an agency head "may" suspend and thereafter remove an employee in specified circumstances. Nowhere does Section 7532 prescribe a mandatory procedure; it may be invoked "[n]otwithstanding other statutes," but nothing in Section 7532 purports to preclude removal actions taken pursuant to "other statutes." See Pet. Br. 28-29.[3]

[3] Clearly, if Section 7532 is used by the agency to suspend and remove an employee then the employee "is entitled, after suspension and before removal, to * * * a hearing, at the request of the employee, by an agency authority duly constituted for this purpose" as well as "a written statement of the decision of the head of the agency" (5 U.S.C. 7532 (c)(3)(C) and (E)). But the fact that a hearing and a decision by the head of the agency are mandated whenever Section 7532 is invoked has nothing to do with whether invocation of Section 7532 is mandated whenever an employee is removed for reasons relating to national security. Thus, the legislative history discussed by respondent (Br. 23-34) to show the importance that Congress attached to the requirements of a hearing and a decision by the head of the agency is simply irrelevant, since those requirements only come into play when Section 7532 is invoked.

Equally irrelevant is respondent's attempt (Br. 27-29) to demonstrate that Section 7532 *could* have been invoked for the "[u]nintentional minor indiscretions" that respondent committed. The question at issue is not whether Section 7532 is a possible avenue for removing an employee who loses his security clearance, but whether it is the only avenue. As we show in our opening brief (at 29-32), the legislative history indicates that Section 7532 was not intended to be an exclusive procedure for removing employees who pose a security risk; it was to be used "only in the exceptional cases where no other speedy and sure method is available to protect the national security." *Hearing on S. 1561 and S. 1570 Before a Subcomm. of the Senate Comm. on Armed Services*, 80th Cong., 2d Sess. 2 (1948) (statement of Mark Edwin Andrews, Assistant Secretary of the Navy).

In lieu of any discussion of the language of Section 7532, respondent relies (Br. 21-22) on 50 U.S.C. 833 as evidence that Congress considered Section 7532 an exclusive procedure for terminating employees on national security grounds. But as we explain in our opening brief (at 25-26 & n.14), Section 833 shows precisely the opposite. The preamble to Section 833 provides that the Secretary of Defense's authority under that provision may be exercised "[n]otwithstanding sections 7512 and 7532 of title 5." Section 7512 contains the "for cause" dismissal protections of the CSRA, protections that are due by statute to preference-eligible NSA employees and that, with the exception of MSPB review, have been afforded by regulation to all other NSA employees. The reference to both Section 7512 and Section 7532 clearly indicates that Congress assumed that removals for cause would continue to occur even in cases with national security implications. See also 50 U.S.C. 832(b) (authorizing boards of appraisal to submit reports and make recommendations on access to classified information, but providing that "appraisal by such a board is not required before action may be taken under sections 7512 and 7532 of title 5, or any other similar provision of law").[4]

[4] Respondent (Br. 22), like the court of appeals (Pet. App. 11a-12a), quotes both these provisions, but excises the two references to Section 7512 and then asserts, based on the elided quotations, that Section 7532 is the only alternative mechanism to Section 833 for removing NSA employees on grounds of national security. But the express references to the ordinary "for cause" procedures clearly indicate Congress's intention not only that loss of a security clearance could be cause for dismissal but also that the "for cause" procedures should be used unless they "cannot be invoked consistently with the national security" (50 U.S.C. 833(a)).

3. Respondent also contends (Br. 23-24) that Section 7532 would be rendered superfluous if the Director of NSA could remove for cause an employee who lost his security clearance because in every case the Director could rely on the regulations relating to "for cause" removals to make "an end run" around the hearing requirement in Section 7532. This puts the matter backwards. Ordinary "for cause" procedures afford federal employees important protections against removal. NSA and other agencies are allowed to bypass these procedures by invoking the summary procedures of Section 7532 only in cases where there is "an immediate threat of harm to the 'national security' " such that the delay incident to the "normal dismissal procedures" could "cause serious damage to the national security." *Cole* v. *Young*, 351 U.S. at 546.

The premise of respondent's argument, as well as of the court of appeals' decision (Pet. App. 12a-13a), is that respondent would somehow receive more protection under Section 7532 than in a "for cause" removal. That premise is wrong, as we explained at some length in our opening brief (at 33-35), and as this Court recognized in *Department of Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988).[5] Respondent was kept on pay status for a period of 16 months while he received written notice, an opportunity to respond and be represented by counsel, several layers of intra-agency review, and a written decision recommending that NSA help respondent find employment in a position that did not require SCI clear-

[5] The Court in *Egan*, slip op. 14, rejected the employee's contention that he "would have received greater procedural protections under § 7532 than he received" under the Navy's "for cause" procedures—procedures comparable to those provided by NSA.

ance.[6] This treatment contrasts sharply with what respondent would have received had the "harsh and drastic" procedures of Section 7532 been invoked (*Egan*, slip op. 14): summary suspension without pay, notice only to the extent consistent with national security, a single hearing of unspecified scope, and, if the determination were made to remove him, ineligibility for any other position in the Department of Defense or, prior to consultation with OPM, for appointment elsewhere in government. Federal employees would be ill-served if Section 7532 became the standard procedure for all removals based on considerations of national security.

In any event, as respondent himself acknowledges (Br. 37), "whether NSA regulations give more or less protection than 7532 * * * can logically have no bearing on whether or not Congress mandated a 7532 hearing for security terminations." Thus, respondent's concern (Br. 38) that the Director of NSA might "revoke his own regulations and leave non-veteran excepted service employees with no procedural rights at all" is simply irrelevant. The fact that nonveterans at NSA have no statutory tenure protection does not imply that Section 7532 is the exclusive means of removing them. Section 7532 applies to employees of many agencies (see Pet. Br. 39-40), including employees in the competitive service, who do receive statutory protections in a "for cause" removal that they do not receive when Section 7532 is invoked (see Pet. Br. 35 n.21). The emergency procedure permitted by Section 7532 does

[6] To the extent that NSA regulations gave respondent "tenure" rights in his job, the requirements of due process were fully satisfied by the procedures respondent received. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985).

not become a mandatory procedure just because non-preference-eligible personnel of a particularly sensitive agency have no statutory protection and have been afforded "for cause" hearing rights only by agency regulation. Cf. *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 8-9 (employees who are deliberately excluded from the comprehensive remedial scheme of the CSRA may not obtain from other statutory sources the protections denied them in the CSRA).[7]

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
AUGUST 1988

---

[7] This Court's recent decision in *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), has no bearing on the issue presented in this case. In *Webster* v. *Doe*, the Court held that the termination authority of the Director of the CIA, 50 U.S.C. 403(c), did not preclude judicial review of colorable constitutional claims arising out of the Director's exercise of that authority. This case, however, at least in its present posture, concerns only whether the Director of NSA used the proper statutory authority in terminating respondent. The court of appeals, because of its resolution of this statutory question, found it unnecessary to consider whether respondent's constitutional claims were reviewable (Pet. App. 15a). Indeed, the court of appeals' construction of the statutes at issue in this case appears to have been motivated, to some extent, by a desire to avoid this "thorny issue" (*ibid.*). The application of this Court's recent decision in *Webster* v. *Doe* to petitioner's constitutional claims will, thus, remain open on remand.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 202037 90618

Supreme Court, U.S.
FILED
JUL 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-751

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID I. SHAPIRO
(Counsel of Record)
GEORGE KAUFMANN
PETER W. MORGAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

HOPE G. NAKAMURA
KATE MARTIN
ALLAN ADLER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
122 Maryland Avenue, N.E.
Washington, D.C. 20022
(202) 544-5388

Attorneys for
Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Respondent's Dismissal Violated 5 U.S.C. § 7532 Because the Government Denied Him His Right to Appeal to the Secretary of Defense	5
A. Respondent Was Dismissed on Grounds of "National Security" Within the Meaning of 5 U.S.C. § 7532	5
B. Once the Government Proceeded to Remove Respondent on "National Security" Grounds, It Was Obligated to Present the Final Dismissal Decision to the Secretary of Defense	8
II. The Government's Proposed Interpretation of Section 7532 Is Precluded as a Matter of Law by Executive Order 10450	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Cole v. *Young*, 351 U.S. 536 (1956) ..... *passim*
Department of the Navy v. *Egan*, 56 U.S.L.W. 4150 (No. 86-1552; decided Feb. 23, 1988) 8, 15, 16
Doe v. *Weinberger*, 820 F.2d 1275 (D.C. Cir. 1987) 6, 11, 16
Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839) 13
Haynes v. *Thomas*, 232 F.2d 688 (D.C. Cir. 1956) 18
Kutcher v. *Gray*, 199 F.2d 783 (D.C. Cir. 1952) 15
Peters v. *Hobby*, 349 U.S. 331 (1955) 4, 18
Service v. *Dulles*, 354 U.S. 363 (1957) 10, 18
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) ..... *passim*
Webster v. *Doe*, 56 U.S.L.W. 4568 (No. 86-1294; decided June 15, 1988) 15

STATUTES:

5 U.S.C. § 7532 ..... *passim*
50 U.S.C. § 833 ..... 3, 8, 13, 15

MISCELLANEOUS:

Brief for the Petitioner, No. 86-1552 ..... 7-8, 16
Brief for the Respondents, No. 101 (Oct. Term 1958) 9-10, 14
DOD Directive No. 5100.23 (May 17, 1967) 15
Executive Order No. 10450, 3 C.F.R. 936 (1949-1953 comp.) ..... *passim*
H.R. Rep. No. 2330, 81st Cong., 2d Sess. (1950) 12, 15
National Security Agency Personnel Management Manual 30-2 (Aug. 12, 1980)
ch. 366.2-5a 6
ch. 371.2 11
S. Rep. No. 2158, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 3278 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-751

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and liberties guaranteed by the Constitution. The ACLU has an organizational interest in ensuring that Government agencies respect the constitutional and statutory rights of their employees. We submit this brief *amicus curiae* with the consent of the parties as provided by the rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 30 years, each Branch of the Government has stated it to be a requirement of federal law that a Government employee whose dismissal is sought on grounds of "national security" has the right to appeal to the head of his agency or department. Congress so stated in the Act of August 26, 1950, now codified in 5 U.S.C. § 7532. The Executive Branch so stated in Executive Order 10450, signed by President Eisenhower three years after the 1950 Act. And this Court so stated in *Cole* v. *Young*, 351 U.S. 536, 546-47 (1956), when it explained that the decision to terminate an employee on "national security" grounds is not reviewable outside the agency but that the employee in such a case does possess the right to appeal to the agency head.

Thirty-five years after President Eisenhower signed Executive Order 10450, making explicit that this right to appeal to the agency head obtains in *all* "national security" dismissal cases, the Government now argues it is free to discharge an employee on "national security" grounds without affording that right. This is a radical assertion, contrary to the will of Congress and to the settled interpretation of 5 U.S.C. § 7532. The Court of Appeals properly rejected it.

This case turns on the following undisputed propositions:

First, the National Security Agency initiated proceedings against respondent to revoke his security clearance because the NSA had "[d]oubts about whether respondent's continued *employment* would be consistent with the national security." (Pet. Br.[1] at 37; emphasis added) Respondent was told at the outset that the NSA's objective was "his proposed removal from *employment*." (*Id.* at 6; emphasis added)

---

[1] The Government's brief is cited as "Pet. Br."

Second, the NSA did not comply with either of the two statutory provisions governing the dismissal of NSA employees for "national security" reasons, 5 U.S.C. § 7532 and 50 U.S.C. § 833, both of which require that the final decision to dismiss an NSA employee on "national security" grounds be made by the head of the department—*i.e.*, by the Secretary of Defense. (Pet. Br. at 8, 22-27)

Third, Executive Order 10450 requires "the head of the department or agency" to make the final dismissal decision in *all* cases in which doubts exist as to whether the individual's continued employment would be consistent with the national security.

Fourth, the NSA did terminate respondent's employment for reasons of "national security," but the Secretary of Defense refused to hear respondent's appeal.

The NSA charted a course in this case—involving politically charged issues of homosexuality and national security—that was intended to avoid involvement by the politically accountable head of the Department of Defense. There is no need to speculate whether this was done for reasons of administrative convenience (*see* Pet. Br. at 27), or to prevent whatever "mischief" NSA officials may have foreseen in involvement by the Secretary of Defense (*see id.* at 39-40), or simply to insulate the Secretary of Defense from a potentially explosive issue. The crucial fact is that the NSA set out to terminate respondent's employment for reasons of "national security," yet refused to honor the requirement, laid down both by Congress (5 U.S.C. § 7532) and by the President (E.O. 10450), that the agency head make the final dismissal decision in such cases.

The NSA's strategy to circumvent this requirement by bifurcating the employment-termination process into (1) a security clearance determination and (2) a "for cause" termination does not alter the legal consequences of the fact that the NSA intended to and did fire respondent on

"national security" grounds. Although the Government might be justified in proceeding by steps in certain cases—such as where a Government employee's loss of a particular clearance may result, over time, in the employee's discharge because of a lack of openings in positions suitable to the employee's levels of clearance, skills, and experience—those circumstances did not exist here; the Government sought respondent's dismissal from the beginning.

Our argument is in two parts. In Part I, we explain that respondent was dismissed on grounds of "national security" within the meaning of 5 U.S.C. § 7532. We show further that once the Government proceeded to remove respondent from his position on "national security" grounds, the Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), required the Government to follow Section 7532 and allow Doe's appeal of the dismissal decision to the Secretary of Defense. Congress conferred that *right* of appeal upon all Government employees in the Act of August 26, 1950, now codified in 5 U.S.C. § 7532, after carefully balancing the interests of both the Government and its employees in "national security" discharge cases.

In Part II, we demonstrate that even if there were some question as to whether Section 7532 by its terms required the Defense Department to allow an appeal to the Secretary, Executive Order 10450 bound the Department to do so. Since the Department did not do so, the judgment of the Court of Appeals must be affirmed. *Peters* v. *Hobby*, 349 U.S. 331 (1955).

ARGUMENT

I. Respondent's Dismissal Violated 5 U.S.C. § 7532 Because the Government Denied Him His Right to Appeal to the Secretary of Defense.

The Government's discharge of Doe was improper because the Government dismissed him expressly on "national security" grounds and yet denied him his statutory right to appeal to the Secretary of Defense. Before turning to the reasons why it is clear that Congress extended a *right* to appeal to the agency head in "national security" cases, we show that, notwithstanding the circumlocutions used by the Government to describe the relationship between the grounds for Doe's dismissal and "national security," this is a paradigmatic "national security" discharge, falling squarely within the class of "national security" cases that Congress intended to regulate in the Act of August 26, 1950.

A. Respondent Was Dismissed on Grounds of "National Security" Within the Meaning of 5 U.S.C. § 7532.

Before initiating proceedings against respondent, the NSA notified him that it was taking action because it had "[d]oubts about whether respondent's continued *employment* would be consistent with the *national security*." (Pet. Br. at 6, 37; emphasis added) The Government concedes that from the outset the NSA was seeking to *discharge* respondent. (*Id.* at 6) Indeed, the first notice respondent received of proposed action against him, a letter from the NSA's Director of Civilian Personnel, stated bluntly: "I am proposing that you be *removed* from your position with the National Security Agency." (Letter, dated November 23, 1982, from Virginia C. Jenkins, p. 2 (C.A. App.[2] at 83); emphasis added) The letter quoted as authority for its proposed action an NSA regulation providing that "'all employees' em-

[2] "C.A. App." refers to the Joint Appendix in the Court of Appeals, which we understand has been filed with this Court.

ployment with the Agency must be clearly consistent with national security.'" (*Id.*, quoting *National Security Agency Personnel Management Manual 30-2*, ch. 366.2-5a (Aug. 12, 1980))

The Government now says that the cause for Doe's removal was "*related to* national security." (Pet. Br. at 23; emphasis added) The Government elsewhere in its brief describes Doe's firing as having "national security *implications*." (*E.g.*, *id.* at 25; emphasis added) To the extent that these locutions are intended to cast doubt on whether Doe was dismissed on grounds of "national security," they are belied by the language in the notice the NSA issued, which is quoted above. The Government is driven to these circuitous formulations by a necessity to obfuscate the critical distinction in this case—*i.e.*, the distinction between dismissals for reasons of "national security," which is a term of art bringing into play the power and limits of 5 U.S.C. § 7532, and dismissals for other reasons. If any question remained, after reading the NSA's notice, about the grounds for Doe's dismissal, that question would be answered by *Cole* v. *Young*, 351 U.S. 536 (1956), the principal authority relied upon by the Government in this case. *Cole* makes clear that respondent was dismissed precisely on grounds of "national security" within the meaning of Section 7532, as the Court of Appeals properly held. *Doe* v. *Weinberger*, 820 F.2d 1275, 1279 (D.C. Cir. 1987).

The issue before the Court in *Cole* was the meaning of "national security" in the Act of August 26, 1950, now codified at 5 U.S.C. § 7532. *Cole*, 351 U.S. at 538. Cole was a food and drug inspector employed by the Department of Health, Education, and Welfare; he was said to have had a " 'sympathetic association' " with alleged subversives. The Government contended in *Cole* that the 1950 Act applied to Cole's dismissal because his alleged disloyalty would have a negative impact on the general welfare of the nation. *Id.* at 544-51. This Court

rejected that argument, concluding that Congress intended "national security" in the 1950 Act "in a limited and definite sense" to apply only to employees in "sensitive" positions, which did not include a food and drug inspector. *Id.* at 548-51.

Cole makes plain that the NSA's decision to seek Doe's discharge is just the sort of decision that Section 7532 was intended to cover. The NSA's concern was that Doe might compromise the security of classified information. *Cole* explains that the need to protect classified information by dismissing employees who are thought to present risks of disclosure was the core justification for the 1950 Act:

> Throughout the hearings, committee reports, and debates, the bill was described as being designed to provide for the dismissal of "security risks." In turn, *the examples* given of what might be a "security risk" *always entailed employees having access to classified materials*; they were security risks because of the risk they posed of intentional or inadvertent disclosure of confidential information. [351 U.S. at 550 (emphasis added; footnote omitted)]

This Court in *Cole* quoted from the Congressional testimony of Mr. Larkin, the representative of the Department of Defense, which had requested and drafted the bill. *Id.* at 550-51. Mr. Larkin, the Court said, made the above consideration more explicit by defining "security risks" exclusively in terms of their access to confidential and classified material: "[I]f they do not have classified material," Mr. Larkin testified, "why, there is no notion that they are security risks to the United States." *Id.* at 550. *See also id.* at n.13 (the Act was intended to apply to an employee "who is working in some highly sensitive agency doing very confidential, secret defense work").[3]

---

[3] Given the Court's elucidation in *Cole* of the underpinnings of Section 7532, the Government's recent statement that "Section 7532 is in fact not concerned with security clearances at all" (Brief for

The dispute concerning respondent's continued employment, moreover, could not fairly be characterized in terms *other than* "national security." NSA employees who sleep on the job or who are incompetent might offer the NSA the option of proceeding to dismiss the employee either on general suitability grounds or, given the agency's mission, on "national security" grounds. But the Government has proffered one *and only one* justification for dismissing Doe on the basis of his private, off-hours sexual activities: the possibility that he might compromise "national security" information. And we are at a loss to imagine a justification other than "national security" for discharging him as a result of whatever sexual liaisons he may have had while on vacation overseas.

B. Once the Government Proceeded to Remove Respondent on "National Security" Grounds, It Was Obligated to Present the Final Dismissal Decision to the Secretary of Defense.

There are at least two dispositive reasons why respondent's dismissal *arose under* Section 7532 so as to trigger the requirement that the Secretary of Defense make the final dismissal decision.[4] The first is that the NSA itself

---

the Petitioner at 43, *Department of the Navy* v. *Egan*, 56 U.S.L.W. 4150 (No. 86-1552; decided Feb. 23, 1988)) requires comment. The statement is true only in the narrow sense that Section 7532 is directed towards *employment* termination decisions rather than security *clearance* decisions as such. But after *Cole* there can be no doubt that Section 7532 is concerned with the need to protect classified information through the vehicle of suspending and dismissing Government employees. This is the goal asserted by the NSA in respondent's case from the beginning.

[4] It is undisputed that the NSA did not proceed under 50 U.S.C. § 833, the other theoretically available option in an NSA "national security" dismissal case. As the Government concedes, Section 833 requires a specific finding by the Secretary of Defense that "the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security," 50 U.S.C. § 833(a); Section 833(a) is "a last resort." (Pet. Br. at 24-25)

characterized the action it was taking in terms of "national security." To be sure, the NSA did not specifically cite Section 7532, but it tracked the material language of the statute when it announced its intention to discharge Doe as a security risk out of concern that his "continued employment would [not] be consistent with the national security." (Pet. Br. at 37)

This Court's decision in *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), leaves no doubt that the NSA was bound under the circumstances to adhere to the procedures set forth in Section 7532. Vitarelli was discharged from the Department of the Interior, *inter alia*, because his associations and activities with persons alleged to be sympathetic to the Communist Party showed him to be " 'not reliable or trustworthy' "; his continued employment was therefore said to be " 'contrary to the best interests of national security.' " *Vitarelli*, 359 U.S. at 537. Vitarelli filed suit, claiming that his dismissal had violated certain procedural requirements set forth in the Interior Department's "national security" regulations. The Government responded by sending Vitarelli a new notice of discharge, which omitted any reference to the grounds for discharge, and by expunging from all existing records the previously stated reason for dismissal. *Id.* at 537-38 & n.1. The Government argued that since it possessed the power to fire Vitarelli summarily for any reason, the Court should disregard the original notice the Government sent to him:

> The dismissal itself was fully valid, even though it was not authorized by the 1950 Act. Citing the incorrect authority for the removal cannot affect the operative act of removing petitioner—an act which is sustainable under the Secretary's untrammeled authority to dismiss one in petitioner's unprotected position. Perhaps, in officially terminating petitioner's employment, references to the 1950 Act, the Executive Order, and the security regulations should not have been made since they indicate that petitioner's removal was based upon considerations of na-

> tional security; but where the authority to remove is clear, the validity of the removal should not now turn upon the initial references to the security program which have been expunged. [Brief for the Respondents, No. 101 (Oct. Term 1958), at 21-22]

This Court rejected the argument, responding as follows:

> Respondent misconceives the effect of our decision in *Cole*. It is true that the Act of August 26, 1950, and the Executive Order did not alter the power of the Secretary to discharge summarily an employee in petitioner's status, without the giving of any reason. Nor did the Department's own regulations preclude such a course. Since, however, the Secretary gratuitously decided to give a reason, and that reason was national security, he was obligated to conform to the procedural standards he had formulated in Order No. 2738 for the dismissal of employees on security grounds. [*Vitarelli*, 359 U.S. at 539]

Precisely the same conclusion is required here. Once the NSA proceeded on its stated course to remove respondent for "national security" reasons, it was required to follow the safeguards established by Congress for such personnel actions, notwithstanding the existence of other possible alternative means for achieving the same result. *See also Service* v. *Dulles*, 354 U.S. 363, 381 (1957) (rejecting the argument that an employee's discharge was not on loyalty grounds, and therefore that the employee was not entitled to the procedures governing such discharges, where *one* of several cited sources of authority for his removal was a loyalty regulation). It does not matter whether, as the Government contends (Pet. Br. at 15-18), it could have dismissed respondent in the absence of regulations without any reason. This Court rejected the identical argument in *Vitarelli*. 359 U.S. at 539-40. The short answer is that the Government elected not to proceed either (1) without a reason or (2) for a reason other than "national security," and the Government is bound by that choice here as it was in *Vitarelli*.

Because this case, like *Vitarelli*, turns on the Government's own choice of "national security" as grounds for dismissal, the Government's contention that affirmance would mire agencies in difficult debates as to whether certain employees are being dismissed on "national security" grounds (Pet. Br. at 40) misses the point. This case involves the narrow question whether an agency can state its intention to discharge an employee for reasons of "national security" and nonetheless ignore statutory requirements governing such discharges. *Vitarelli* holds that the Government under these circumstances may not ignore its own regulations. Since agency regulations are of a lower order than statutory requirements imposed by Congress, it follows *a fortiori* from *Vitarelli* that the NSA cannot evade the requirements of a Congressional statute under these circumstances.[5]

The second dispositive reason why the NSA was not free to disregard the requirement of agency-head involvement is found in the language of Section 7532 and in its legislative history. Chief Judge Wald's opinion for the Court of Appeals in this case, in which Judges Bork and Silberman joined, makes a persuasive, and essentially unrebutted, demonstration that under the governing statutory schemes the NSA does not possess an implicit authority to fire an NSA employee summarily on "national security" grounds without involvement by the department head. *Doe* v. *Weinberger*, 820 F.2d at 1278-82. We find it unnecessary to repeat here the analysis of the text and legislative history undertaken by the Court of Appeals, which "effectively shoots down the theory that § 7532 is only an extra option for agencies wishing to fire employees as national security risks." *Id.* at 1280. But we do stress that the legislative history to Section 7532 reveals

---

[5] The agency-head requirement of Section 7532, moreover, is carried forward in Executive Order 10450 (see Part II, *infra*) and in NSA regulations. *E.g.*, *National Security Agency Personnel Management Manual 30-2*, ch. 371.2 (Aug. 12, 1980).

in unmistakable terms that Congress did *not* intend the statute to be a mere supplementary way to proceed in "national security" cases, as the Government contends.

Both the Senate and House Reports on the 1950 Act emphasize that the Act was intended to extend to Government employees a *right* to appeal to the agency head. The House Report notes:

> Under present law, with respect to [the Departments of State and Defense], the officer or employee who is suspended or terminated as a security risk is not entitled *as a matter of right* to an appeal to the head of the agency concerned. *This legislation extends this appeal right* to employees of [these agencies]. [H.R. Rep. No. 2330, 81st Cong., 2d Sess. 3 (1950) (emphasis added)]

The Report goes on to state that the House Committee "carefully considered" arguments made by representatives of federal employee organizations that procedures allowing for appeals to an outside agency were needed, "but determined that in the interest of national security an appeal beyond the head of the department or agency concerned was inadvisable." *Id.* at 4. The Senate Report also reflects Congress's intent to protect the "rights of the individual" by providing a right to appeal to the agency head in "national security" cases, S. Rep. No. 2158, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 3278, 3279-80, and underscores that the agency head cannot delegate this duty: "It is the intention that the head of a department can delegate his authority to suspend an employee but he cannot delegate his power to terminate the services of an employee * * *." *Id.* at 3280. The Secretary of Defense's refusal to hear Doe's appeal contravened this explicit statement of Congressional intent.

There is, moreover, a fundamental error in the Government's argument that it has an "implicit" right to

discharge employees on "national security" grounds. The error flows from the Government's repeated misuse of a dictum in *Cole*. This Court observed in *Cole* that its decision did not preclude the Government from dismissing "disloyal" employees for "cause" under the personnel laws (the Lloyd-LaFollette and Veterans' Preference Acts). *Cole*, 351 U.S. at 543-44. The Government reasons from this remark (1) that inherent authority must exist to dismiss employees for "cause" on "national security" grounds and, therefore, (2) that the NSA was not bound to follow either Section 7532 or Section 833 in respondent's case. (Pet. Br. at 21-22, 24-25) Both conclusions are wrong.

To begin with, the first conclusion is sheer wordplay, turning *Cole* on its head. *Cole* stands for the proposition that "national security" dismissals are distinct from other dismissals. Section 7532 applies to the former, but not to the latter. The Court's observation that "disloyal" behavior encompasses many things and that the Government does possess the *specific statutory* power under the personnel laws to dismiss Government employees for general "disloyalty" obviously does not mean that there is an *inherent* right to dismiss Government employees summarily under all circumstances, much less in cases in which the Government announces that it is seeking an employee's dismissal for reasons of "national security," thereby triggering the "national security" dismissal statutes.[6]

The Government seized upon this same *Cole* dictum in its brief in *Vitarelli* to urge that Vitarelli's dismissal should be upheld, notwithstanding that the discharge was

---

[6] *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839), and the other Government-employee cases the Government cites on page 16 of its brief are not to the contrary. Those cases merely state a presumption in favor of the Government's power, in the *absence* of statutes, to discharge the employees whom it hires. *Cole* teaches that when Congress legislates restrictions in an area, as it did in the "national security" field, that presumption ends.

not authorized by the 1950 Act, "as a valid exercise of the appointive and removal powers of the Secretary of Interior derived from 'the primary source'—the Constitution." (Brief for the Respondents, No. 101 (Oct. Term 1958), at 21) The Court rejected that argument. *Vitarelli*, 359 U.S. at 539. *Cole* could not be read to "justify noncompliance by the Secretary with regulations promulgated by him." *Id.* The effect of the Court's decision in *Cole*, after all, was to *prohibit* the Government from circumventing statutory restraints (contained in the Veterans' Preference Act) governing employee discharges.[7]

The argument the Government advances would radically rework the statutory protections described in *Cole*. This Court explained in *Cole* that the 1950 Act had two central purposes: (1) to allow for immediate suspensions in "national security" cases and (2) to provide for termination, without benefit of outside appeal, by *agency heads*. *Cole*, 351 U.S. at 546. The Court observed that an "obvious justification" underlay the former purpose, and then stated:

> Likewise, there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. [*Id.*]

As noted above, the requirement that the agency head make the final decision in a "national security" case involving loss of employment was an important purpose of the 1950 Act, particularly because of the *unavailability*

[7] Again the Government resurrects here an argument it pressed unsuccessfully in *Vitarelli*: that the 1950 Act "did not confer upon petitioner any procedural or substantive rights against removal"; that the Act's purpose was simply to facilitate removal by summary procedures. *Compare* Brief for the Respondents, No. 101 (Oct. Term 1958), at 9, *with* Pet. Br. at 29-32.

of outside review of the merits, a proposition reaffirmed in *Department of the Navy* v. *Egan*, 56 U.S.L.W. 4150 (No. 86-1552; decided Feb. 23, 1988).[8] But the Government ignores the corollary proposition that Congress believed, on balance after careful consideration, that outside appeals were unnecessary to protect employee rights *because* Congress was granting employees in the 1950 Act the *right* to appeal to the agency head. H.R. Rep. No. 2330, at 3-4. The failure of the department head to make the final decision in such a case has long been reversible error. *See Kutcher* v. *Gray*, 199 F.2d 783, 787-88 (D.C. Cir. 1952).[9]

The Government contends that respondent should not complain because he "received greater protections under NSA regulations than either [Section 7532 or Section 833] affords." (Pet. Br. at 11-13, 33-34) This argument is wrong. First, an agency may not impose a trade-off upon a Government employee to whom Congress has granted explicit statutory protections on the agency's own view that the latter are less valuable than those the agency chooses to provide. Second, the NSA's "for cause" regulations are irrelevant to the interpretation of Section 7532: The regulations post-date the 1950 Act;

[8] *Egan* holds that Government employees are not entitled to outside review of the merits of security-clearance decisions that result in discharge, regardless whether the Government follows a procedure that specifically provides for outside review of the dismissal decision. Judicial review of agency compliance with the Constitution, federal statutes, and federal regulations remains available in such cases, however. *See Webster v. Doe*, 56 U.S.L.W. 4568 (No. 86-1294; decided June 15, 1988); *id.* at 4570 n.8.

[9] The Government's proposed interpretation of Section 7532 is, moreover, fundamentally inconsistent with President Eisenhower's interpretation of the 1950 Act in Executive Order 10450 (see Part II, *infra*), as well as with DOD Directive No. 5100.23 (May 17, 1967), under which the Secretary of Defense "in accordance with" Section 7532 and E.O. 10450, expressly withheld from the head of the NSA the power "to terminate the services of an employee in the interest of national security."

unlike Section 7532, they apply only to the NSA rather than Government-wide; and, unlike Section 7532, they can be rescinded by the agency at any moment, leaving NSA employees altogether without their protections. The Court of Appeals correctly held that agency-head involvement in discharge cases is, under the existing procedural scheme, an *additional* safeguard for the employee. *Doe* v. *Weinberger*, 820 F.2d at 1282.

Finally, the Government states that affirmance in this case "would lead to mischief extending well beyond NSA," because "every routine decision to revoke a required clearance would require procedures suitable to an immediate threat to national security, including the personal attention of the head of the agency." (Pet. Br. at 39-40) This statement is inconsistent with the assurances the Government provided to the Court just a few months ago in *Egan*, that "removal is by no means an automatic *or ordinary* consequence" of the denial or revocation of a clearance (Brief for the Petitioner, No. 86-1552, at 12; emphasis added) and that "[t]he denial or revocation of a security clearance need not, and *quite commonly* does not, lead to any 'adverse action'" (*id.* at 24 n.13; emphasis supplied). Affirmance would simply mean that the Government could not evade Congressionally imposed safeguards in the *non*-ordinary and *un*common situation where an employee's removal is sought on grounds of "national security." If the Government objects to the requirement that the head of the agency give his "personal attention" to such discharges, the Government must seek relief from Congress, not this Court.

II. The Government's Proposed Interpretation of Section 7532 Is Precluded as a Matter of Law by Executive Order 10450.

Even if Section 7532 did not apply by its terms to the dismissal in this case, affirmance would still be necessary

because the NSA did not comply with the *mandatory* language of Executive Order 10450. The preamble to Executive Order 10450 states that it was intended to protect both the national security interest and the procedural and substantive rights of Government employees. A principal source of authority for the Order was the 1950 Act, which the Order interpreted and implemented. Sections 5 and 6 of the Order govern Executive Branch dismissals of employees from *any* department or agency on "national security" grounds, and cite the 1950 Act. Those sections make clear that the head of the department or agency must make the final termination decision in *all* cases of dismissal of Government employees on "national security" grounds: "*Whenever*" it appears that the retention of any Executive Branch employee "may not be clearly consistent with the interests of the national security, * * * *the head of the department or agency* concerned *shall* terminate" the individual's employment (emphasis added).[10]

---

[10] Sections 5 and 6 provide in full:

> Sec. 5. *Whenever* there is developed or received by *any department or agency* information indicating that the retention in employment of *any officer or employee of the Government* may not be clearly consistent with the interests of the national security, such information *shall* be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, *shall* review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.
>
> Sec. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as

Agencies are, of course, bound by executive orders, *Peters* v. *Hobby*, 349 U.S. 331, 345 (1955), just as they are bound by their own regualtions, *Vitarelli*, *supra*; *Service* v. *Dulles*, 354 U.S. 363 (1957). And it has been squarely and correctly held that a dismissal decision must be reversed if it violates Executive Order 10450, regardless whether the decision technically complies with the 1950 Act. *Haynes* v. *Thomas*, 232 F.2d 688 (D.C. Cir. 1956). The Court of Appeals held in *Haynes* v. *Thomas* that Executive Order 10450 was intended to afford the protections of the 1950 Act to probationary employees; therefore, the court held, even if the 1950 Act by its terms did not protect probationary employees, the Government's failure to comply with the Act's procedures in the case of Haynes, who was a probationary employee, was still reversible error. 232 F.2d at 692. The NSA's action in Doe's case also violated Executive Order 10450, because the NSA denied him a protection extended in the Order to *all* Executive Branch employees. The NSA's dismissal decision therefore cannot stand.

---

he deems necessary, *the head of the department or agency concerned shall terminate* the employment of such suspended officer or employee *whenever he shall* determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950. [Emphasis added.]

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID I. SHAPIRO
(Counsel of Record)
GEORGE KAUFMANN
PETER W. MORGAN
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

HOPE G. NAKAMURA
KATE MARTIN
ALLAN ADLER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
122 Maryland Avenue, N.E.
Washington, D.C. 20022
(202) 544-5388

Attorneys for
Amicus Curiae